No. 06-1221
Title: Sprint/United Management Company, Petitioner
v.
Ellen Mendelsohn
Docketed: March 9, 2007
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (05-3150)
Decision Date: November 1, 2006
Rehearing Denied: January 16, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 5 2007	Petition for a writ of certiorari filed. (Response due April 9, 2007)
Mar 9 2007	Waiver of right of respondent Ellen Mendelsohn to respond filed.
Mar 21 2007	DISTRIBUTED for Conference of April 13, 2007.
Mar 27 2007	Response Requested . (Due April 26, 2007)
Mar 28 2007	Motion for leave to file amici brief filed by Equal Employment Advisory Council and Society for Human Resource Management.
Apr 20 2007	Order extending time to file response to petition to and including May 11, 2007.
May 11 2007	Motion for leave to file amici brief filed by AT&T Mobility LLC, et al.
May 11 2007	Brief of respondent Ellen Mendelsohn in opposition filed.
May 21 2007	Reply of petitioner Sprint/United Management Company filed.
May 22 2007	DISTRIBUTED for Conference of June 7, 2007.
Jun 11 2007	Motion for leave to file amici brief filed by Equal Employment Advisory Council and Society for Human Resource Management GRANTED.
Jun 11 2007	Motion for leave to file amici brief filed by AT&T Mobility LLC, et al. GRANTED.
Jun 11 2007	Petition GRANTED.
Jul 10 2007	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 9, 2007.
Jul 10 2007	The time to file respondent's brief on the merits is extended to and including September 27, 2007.
Aug 3 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Aug 3 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Aug 7 2007	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including August 20, 2007.
Aug 7 2007	The time to file respondent's brief on the merits is further extended to and including October 19, 2007.
Aug 17 2007	Brief amicus curiae of Employers Group filed.
Aug 20 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Aug 20 2007	Joint appendix filed. Statement of costs received.
Aug 20 2007	Brief of petitioner Sprint/United Management Company filed.
Aug 20 2007	Brief amicus curiae of United States filed.

Aug 20 2007	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Oct 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 12 2007	CIRCULATED.
Oct 15 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 15 2007	SET FOR ARGUMENT Monday, December 3, 2007.
Oct 19 2007	Brief amicus curiae of AARP filed. (Distributed)
Oct 19 2007	Brief of respondent Ellen Mendelsohn filed. (Distributed).
Oct 19 2007	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed).
Nov 5 2007	Record for U.S.D.C. for the District of Kansas is electronically filed.
Nov 9 2007	Record received from U.S.C.A. for the 10th Circuit. (1 box)
Nov 16 2007	Reply of petitioner Sprint/United Management Company filed. (Distributed)
Dec 3 2007	Argued. For petitioner: Paul W. Cane, Jr., San Francisco, Cal. For United States as amicus curiae: Gregory D. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Dennis E. Egan, Kansas City, Mo.

Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a recurring question of proof in employment discrimination cases: whether a district court must admit "me, too" evidence — testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

The Tenth Circuit panel majority held that a court commits reversible error by excluding "me, too" evidence. This decision conflicts with those of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that "me, too" evidence may be excluded under Federal Rule of Evidence 403. Granting certiorari will resolve the conflict between the circuit courts of appeals on this important question of law.

PARTIES TO THE PROCEEDING

Ellen Mendelsohn, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Sprint/United Management Company, now a subsidiary of Sprint Nextel Corporation.

STATEMENT PURSUANT TO RULE 29.6

Sprint/United Management Company is a wholly owned subsidiary of Sprint Nextel Corporation, which issues shares to the public. (The employer for simplicity will be referred to herein as "Sprint.")

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PETITION FOR A WRIT OF CERTIORARI

Sprint respectfully prays that a writ of *certiorari* issue to review a final judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is officially reported, *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006), and is reproduced in the Appendix ("Pet. App.") 1a-23a. Sprint petitioned for rehearing and rehearing *en banc* on November 15, 2006. The court of appeals' order denying Sprint's petition is reproduced at Pet. App. 25a-26a. The district court's earlier minute order granting Sprint's motion *in limine* is reproduced at Pet. App. 24a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals panel issued its opinion on November 1, 2006. Sprint timely petitioned for rehearing and rehearing *en banc* on November 15, 2006. The panel denied rehearing, and the full court denied rehearing *en banc* on January 16, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act ("ADEA") is codified at 29 U.S.C. §§ 621-634. The relevant provisions of the Act are reproduced at Pet. App. 27a-28a. Federal Rules of Evidence 401, 402 and 403 are reproduced at Pet. App. 29a.

STATEMENT OF THE CASE

1. Respondent Ellen Mendelsohn worked for Sprint from 1989 until November 2002, most recently in Sprint's Business Development Strategy Group. She was laid off then in a reduction in force, as the Business Development Strategy Group undertook to downsize from 75 to 57 persons. Mendelsohn's immediate supervisor rated Mendelsohn as the weakest performer in his unit. Vice President Paul Reddick therefore decided to include Mendelsohn in the layoff.

2. Other Sprint units over a period of months and years also downsized, as Sprint sought to cope with the telecommunications industry's recession. Decisions as to specific affected individuals were made by the supervisors and managers responsible for each downsizing department or other business unit. Over a period of about 18 months, about 15,000 employees were released.

3. Mendelsohn was 51 when she was laid off. She filed an administrative charge with the Equal Employment Opportunity Commission ("EEOC") in April 2003, alleging age discrimination. The EEOC dismissed the charge because it concluded that the evidence failed to establish a violation of law.

4. In August 2003, Mendelsohn sued under the ADEA in the U.S. District Court for the District of Kansas. She alleged disparate treatment based on age (not adverse impact), and by the time of the Pretrial Conference Order she abandoned any allegation of a pattern or practice of age discrimination.

5. Before trial, Sprint moved *in limine* to exclude testimony from five witnesses. The five were former Sprint employees who would claim that they themselves had been released based on age, in layoffs conducted in other departments by other managers. (Such persons sometimes are known as "me, too" witnesses, *e.g.*, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 30 (3d ed.).) The district court (Vratil, J.) granted Sprint's motion *in limine*, holding that only persons "similarly situated" to Mendelsohn would be allowed to testify about their personal circumstances. Specifically, the district court ruled that former employees who were laid off by Mendelsohn's ultimate supervisor, Reddick, in close temporal proximity to Mendelsohn's own layoff, were similarly situated to Mendelsohn and could testify about their own claims and circumstances.[1]

6. Applying those criteria, the district court excluded testimony from the five former employees that Mendelsohn identified. Reddick did not supervise (directly or indirectly) any of them. The five persons had been laid off as many as nine months before Mendelsohn, or as many as three months after. None of the five worked in the Business Development group, and neither Reddick nor anyone in his chain of

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[1] The district court's order provided, in relevant part:

> Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for purposes of this ruling, requires proof that (1) Paul R[e]ddick was the decision-maker in any adverse action; and (2) [there was] temporal proximity [in the layoff decisions].

Pet. App. 24a.

management had anything to do with their layoffs. Three of the five "me, too" witnesses sought to testify that they had either heard or been subjected to discriminatory ageist remarks by their various supervisors. Neither Reddick nor anyone else in the Business Development group was alleged to have uttered those or similar remarks, and Mendelsohn never heard any ageist remarks herself. One of the three witnesses sought to testify that she had seen a spreadsheet from a supervisor (not Reddick), to whom she did not report, suggesting that age was one of the criteria that particular supervisor may have considered in making layoff decisions. There is no comparable evidence for Mendelsohn or anyone else in the Business Development group. A fourth employee sought to testify that he had information that he had been given a false evaluation; that he had been banned from working at Sprint; and that he had witnessed harassment of another employee because of her age. None of these allegations had anything to do with Reddick or the Business Development group. The fifth employee sought to testify that he had been replaced by a younger person who had no relevant experience, and that his repeated post-RIF job applications all were turned down. None of this had anything to do with Reddick or the Business Development group.

7. The jury returned a verdict for Sprint, finding that Sprint did not discriminate against Mendelsohn based on age.

8. Mendelsohn appealed. A panel of the Tenth Circuit (per Baldock, J.) reversed in a 2-1 decision. The majority held that "me, too" testimony from the five ex-employees was relevant even though none of the five witnesses reported to or was laid off by Reddick, and even though none worked in the Business Development group with Mendelsohn. Pet. App. 9a-10a. The proffered "me, too" evidence

nevertheless was said to be probative of an alleged company-wide discriminatory scheme; according to the majority, "me, too" evidence is admissible if there is evidence of a common scheme or plan, and a common scheme or plan can be inferred from the "me, too" evidence. *See id.* 10a-11a. The panel majority also held that the district judge lacked the discretion under Federal Rule of Evidence 403 to exclude the "me, too" evidence. *Id.* 15a-16a.

9. Judge Tymkovich dissented. He contended that evidence concerning decisions made by persons other than the decisionmaking supervisor should be excluded except where there is "independent evidence of specific enterprise-wide policy." *Id.* 22a. The evidence here did not establish that Reddick harbored discriminatory animus toward Mendelsohn, or that the RIF was a pretext for a company-wide discriminatory policy. Thus, the dissent argued, the majority created an erroneous rule of law that "even the most tangentially relevant and prejudicial testimony by former employees is per se admissible." *Id.* 23a.

10. Sprint petitioned for rehearing. The panel (again 2-1) denied rehearing, and the full court voted 7-5 to deny rehearing *en banc*. *Id.* 25a-26a.

REASONS FOR GRANTING THE PETITION

This case presents an important question, one that recurs in most employment discrimination cases. The question closely divided the Tenth Circuit, and the panel decision conflicts with decisions of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that such evidence, even if perhaps peripherally relevant, may be excluded under Federal Rule

of Evidence 403. Departing from the rule in these cases, the Tenth Circuit panel majority held that a district court not only *may* admit "me, too" evidence, but that it *commits reversible error* by excluding it. Only decisions of the Eighth Circuit arguably are consistent with that of the Tenth Circuit here. This Court should grant *certiorari* to resolve the conflict in the court of appeals cases on this important and "controversial" question of law, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 30 & nn.115-117 (3d ed.) (noting the conflict in the circuits).

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF AT LEAST FOUR OTHER CIRCUITS IN HOLDING "ME, TOO" EVIDENCE RELEVANT IN A DISPARATE TREATMENT CASE

A. This Court's Cases Teach That Discrimination Is Proven (Or Not) Based On The Mindset Of The Decisionmaking Supervisor Or Manager.

A discrimination trial by its nature tests the "[decisionmaking] employee's state of mind" in acting on the employer's behalf. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 520 (1993). This Court's cases therefore properly focus on the decisionmaker, rather than on attitudes of or remarks by other persons who played no role in the employment dispute at issue.

Where the decisionmaker is shown to be biased, liability can result. *E.g.*, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (reversing summary judgment based on potentially discriminatory remarks by the decisionmaker); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 152, 151 (2000) (relying on evidence that one "Chesnut was

the actual decisionmaker," and the "evidence that Chesnut was motivated by age-based animus"); *see United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.2 (1983) (noting that plaintiff had "introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular").

By contrast, where the decisionmaker is *not* shown to be biased, no discrimination liability exists. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003) ("[I]t [cannot] be said that [the decisionmaker,] Bockmiller[,] was motivated to reject respondent's application because of his disability if Bockmiller was entirely unaware that such a disability existed."); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (discriminatory remarks by someone are not probative if they are "unrelated to the decisional process itself").

As shown below, the Tenth Circuit majority departed from these established principles of discrimination analysis and proof.

B. The Tenth Circuit's Decision Conflicts With Settled Law From Other Circuits.

Discrimination plaintiffs often seek to buttress their cases with testimony of nonparty witnesses. Such testimony of course is properly admissible if the nonparty witnesses have something relevant to say (such as reporting biased statements, or setting forth relevant comparative evidence) that sheds light on the thought processes of the person(s) who were decisionmaker(s) with respect to the actual plaintiff. But such evidence is not admissible if the nonparty

witnesses simply would assail different decisionmakers who lack nexus to the plaintiff.

1. Four circuits have squarely held that "me, too" evidence is not relevant.

Typical is the Second Circuit's oft-cited decision in *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984). In that case the plaintiff alleged that his supervisor discharged him because of age. At trial, the district court permitted the plaintiff to call as witnesses six former employees, all of whom testified that they, too, were discharged because of age. A jury awarded damages to the plaintiff, but the Second Circuit reversed. The district court should have excluded the testimony of the six former employees, the court held: "[T]heir testimony, aside from presenting unnecessary collateral issues, provided 'no basis for an inference of discrimination,'" because the circumstances of the six others bore no logical relationship to the plaintiff. *Id.* at 121 (citation omitted).[2]

The Fifth Circuit held similarly in *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), *overruled on other grounds, Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990). In that case plaintiff sued for race discrimination. The district court declined to permit plaintiff to present testimony from three "me, too" witnesses, each of whom wished to contend that he or she also was a race discrimination victim. Defendant won at trial, and plaintiff appealed. The Fifth Circuit affirmed the district court, holding that the proffered "me, too" evidence simply was not relevant

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[2] The Second Circuit restated its holding in *Haskell* shortly thereafter. *Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985) (statements by individuals with no nexus to the challenged employment decision have no bearing on the plaintiff's claim) (citing *Haskell*, 743 F.2d at 121).

because it shed no light on plaintiff's circumstances. Explained the Fifth Circuit:

> To prevail he had to show that Conoco purposefully discriminated against him. The witnesses Goff wanted to call could not testify as to Conoco's motive, intent, or purposefulness in failing to promote Goff. None of them had worked with Goff at Conoco, and none had any knowledge of Goff's experience or relationship with the company. All the witnesses could have testified to was their own individualized dealings with Conoco. Because none had worked in Goff's department, their testimony would not have concerned the same supervisors of whom Goff complained. Because this testimony would not have related to the issue of whether Goff suffered discrimination, the court did not err in refusing to admit this testimony.

Goff, 678 F.2d at 596-97.

The Fifth Circuit more recently elaborated on that rule in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000). In that case two plaintiffs sued for age discrimination. The district court permitted plaintiffs to elicit "testimony pertaining to other employees in other branches of the company who held different positions under different supervisors," all of whom contended that they, too, were discharged based on age. *Id.* at 298. Plaintiffs prevailed at trial and were awarded damages. The Fifth Circuit reversed and granted a new trial because "[s]horn of this ... irrelevant evidence, the judgment cannot stand." *Id.* Plaintiffs contended that the testimony was relevant because it tended

"to show that United Companies, a company of 2700 employees, had 'a pattern or practice' of discriminating against older workers." *Id.* at 302. The court rejected the contention; "A 'pattern or practice' of discrimination does not consist of 'isolated or sporadic discriminatory acts by the employer.'" *Id.* (quoting *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984)). "Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff," the court held. 212 F.3d at 302. That was not the case in *Wyvill*; "testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determining factor in the plaintiff's discharge." *Id.*

The Sixth Circuit said the same thing in *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997). The plaintiff in that case alleged race discrimination in hiring. He sought to buttress his case by calling as a witness another African-American applicant, who also had not been hired. The district court excluded the evidence, and the Sixth Circuit affirmed. The proffered evidence was of "no relevance" because it involved a different position, requiring different qualifications, and the hiring decisionmakers were different persons. The evidence had "no apparent connection" to plaintiff's application for employment, and therefore was properly excluded. *Id.* at 1130.

In an earlier case from the same court, *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the court reasoned similarly. The plaintiff was laid off from his job

along with others as the business downsized by approximately 33%. *Id.* at 154. Plaintiff sued, alleging age discrimination. At trial, plaintiff sought to buttress his case with testimony from two other older workers who were laid off from two other sites within approximately a year of plaintiff's own layoff. The two "me, too" witnesses testified that they had heard their own supervisors make discriminatory, ageist comments. The jury ruled for plaintiff and awarded damages. The Sixth Circuit reversed and granted a new trial, holding that the two "me, too" witnesses' testimony was irrelevant. The person who decided on plaintiff's layoff was not the same person who decided on the layoffs of the "me, toos"; all persons worked in different geographical areas, under different supervisory chains. Thus, the court concluded, "there was no evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision to terminate Schrand." *Id.* at 156. In language equally applicable to the instant case, the court explained: "The fact that two employees of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told they were being terminated because they were too old, is simply not relevant to the issue in this case." *Id.*

One of the most-cited decisions on the issue is an early district court case summarily affirmed by the Third Circuit, *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980). That case, like the instant one, alleged age discrimination in a layoff decision. Plaintiff sought to introduce testimony from five other employees laid off at the same time, each alleging that he, too, was laid off based on age. The district court excluded the evidence, and the trial resulted in a defense verdict. The court denied a new trial motion that alleged evidentiary error, and the Third Circuit affirmed; "[T]o the extent testimony of each witness

was about his own lay off, it was not relevant to [plaintiff]'s lay off," the court declared. *Id.* at 392.

2. The Tenth Circuit, by contrast, now has held "me, too" evidence to be relevant.

The Tenth Circuit majority's decision in this case conflicts with these cases. There was no logical nexus between Mendelsohn and the five "me, toos." The five worked at different sites, in different business units, and reported through different supervisory chains. Evidence concerning employees other than a plaintiff of course may be relevant where their circumstances are sufficiently similar to those of the plaintiff to provide insight into what happened to the plaintiff. Typically this means that the "me, too" witness must report to the same decisionmaker as the plaintiff, because employment decisions — discriminatory and nondiscriminatory ones alike — are effectuated by the individual supervisors who make them. A witness who can testify about a particular decisionmaker often can shine light on whether that person's decision about the plaintiff is discriminatory. On the other hand, where (as here) the proffered "me, too" witness reported to a different supervisor or worked in a different location or business unit, the requisite similarity of circumstances — and thus relevance — is lacking, as the array of decisions from the other circuits teaches.

The panel majority held, however, that the evidence was relevant here because a common discriminatory scheme might have infected decisions as to a group of employees who otherwise would lack a common link to each other. Pet. App. 9a-10a.[3] But there was no evidence of such a

[3] The panel majority seemed troubled that, without the "me, toos," a reduction-in-force plaintiff who worked in a unit without other layoffs would lack evidence with which to prove a case. (Pet. App. 9a.) The majority's concern is groundless. Any discrimination

(Cont'd)

discriminatory scheme. (Indeed, Mendelsohn abandoned in the Pretrial Conference Order any allegation of a pattern or practice of discrimination.) As dissenting Judge Tymkovich demonstrated, the majority's reasoning was entirely circular:

(Cont'd)

plaintiff (whether laid off in a RIF or otherwise, or made subject to some other cognizable adverse employment action) always has access to the traditional forms of discrimination proof:

- discriminatory remarks by decisionmakers, *e.g.*, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (citing discriminatory remarks by decisionmakers);
- comparative evidence, showing more favorable treatment of younger persons similarly situated in relevant respects, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant to [a showing of pretext] would be evidence that [other] employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.");
- statistical evidence, from which an inference of discrimination sometimes can be drawn, *see id.* at 805 ("[S]tatistics as to [defendant's] employment policy and practice may be helpful to a determination of whether [defendant's] [adverse action] conformed to a general pattern of discrimination . . . ."); and
- proof under the doctrine of *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 147-48 (2000) (permitting an inference of discrimination where the employer's proffered nondiscriminatory reason is judged to be mendacious).

Mendelsohn's problem was not that the district court deprived her of the conventional forms of proof, but that the jury heard her evidence and found it wanting.

"Me, too" evidence is admissible if there exists a common scheme or plan, and (according to the panel majority) a common scheme or plan exists if there are "me, too" witnesses. *See id.* 20a-21a.

In sum, the Tenth Circuit majority's analysis of relevance squarely conflicts with holdings of the Second, Third, Fifth and Sixth circuits, and clear dictum from the Fourth.[4] Only the Eighth Circuit's decisions arguably can be reconciled with the Tenth Circuit majority's decision here.[5] This Court should grant *certiorari* to resolve the conflict.[6]

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[4] *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (the court's proper focus is the plaintiff's personal experience rather than the plaintiff's co-workers' experiences) (citing *Schrand*, 851 F.2d at 156, and *Haskell*, 743 F.2d at 121-22).

[5] *See Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (reversing a defense verdict where the trial judge had excluded from evidence proof that there were "other age discrimination lawsuits filed against [the employer]"); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (reversing a defense verdict where the plaintiff had not been permitted to show "an employer's background of discrimination"). *But cf. Callanan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996) (affirming defense verdict where the trial judge had excluded the testimony of certain witnesses; "the witnesses did not complain that [plaintiff's] own supervisors had engaged in any behavior that we could correctly characterize as improper").

[6] This Court already has granted *certiorari* in a different case from the Tenth Circuit, presenting the related question of when the bias of one decisionmaker taints a decision made in part by another. *EEOC v. Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, No. 06-341, 127 S. Ct. 852 (January 5, 2007). That case will not be dispositive of this one because the plaintiff in that case presented evidence that a biased employee played a role in the factfinding that led to the plaintiff's dismissal. 450 F.3d at 491. There

(Cont'd)

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF AT LEAST FIVE OTHER CIRCUITS IN HOLDING THAT A DISTRICT COURT ABUSES ITS DISCRETION UNDER FED. R. EVID. 403 IN EXCLUDING "ME, TOO" EVIDENCE

The panel majority's decision conflicts with those of other circuits for a wholly separate reason. As shown in Section I, most circuits hold that "me, too" evidence *never may be admitted*, as it is irrelevant. The Tenth Circuit has held, however, that such evidence *never may be excluded*, even under Federal Rule Evidence 403.[7] The Tenth Circuit announced a per se rule of law that a district judge lacks the authority to declare (for example) that unfair prejudice outweighs any relevance under Rule 403. The Tenth Circuit's decision contradicts the plain terms of Rule 403 and a host of court of appeals decisions construing it, as shown below.

(Cont'd)

is no such claim in this case; it is undisputed that the decisionmakers with respect to each of the "me, too" witnesses here had nothing to do with Mendelsohn's layoff. Thus, while the Court may wish to consider hearing the instant case in tandem with that one — both present important and different issues of discrimination proof — the disposition of the *Coca-Cola Bottling* case will not shed meaningful light on the proper disposition of this one.

[7] Rule 403, reproduced in full at Pet. App. 29a, provides that district courts should exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A. The Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On "Considerations Of Undue Delay [And] Waste Of Time."

The admission of this kind of evidence needlessly burdens the courts, because this case ("an eight-day trial," the Tenth Circuit majority reported, Pet. App. 4a) surely would become a four-, five- or six-*week* trial if the district court must permit trials-within-a-trial on the circumstances of the five "me, toos." For every piece of "me, too" evidence the plaintiff presented as to each of the five witnesses, Sprint would be entitled to counter with what might be called "not you, either" evidence, to rebut their claims. Thus, for example, Sprint could present, for each of the "me, toos," testimonial and documentary evidence of performance shortcomings or skills limitations, whatever led the decisionmaker to put that individual on the layoff list. Sprint also would be entitled to introduce proof about other older workers who were *not* laid off, to show that older workers as a group were not disfavored. All this injects into the case witnesses who had no involvement with the plaintiff, and documentary evidence that had no bearing on the plaintiff. Thereafter, the plaintiff in turn would produce additional testimonial and documentary evidence in reply to the various components of the defendant's showing. As the court described in *Moorhouse*, this would compound the case geometrically, by requiring numerous trials-within-a-trial:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own lay off, each, in essence, would have presented a prima facie case of age discrimination. Defendants then would have been

> placed in the position of either presenting the justification for each witnesses' lay off, or of allowing the testimony to stand unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

501 F. Supp. at 393 (footnote omitted).

As a result, numerous courts of appeals have held that Rule 403 is a proper basis for excluding "me, too" evidence. *E.g.*, *Wyvill*, 212 F.3d at 303 (trial court's admission of this evidence entitled defendant "to respond to each witness's claims, and creat[ed], in effect, several 'trials within a trial'"; these "mini-trials were not probative on the issue of whether [the plaintiffs] faced discrimination"); *Williams*, 132 F.3d at 1130 (the admission of "me, too" evidence would have required the defendant to present testimony explaining why a nonparty witness had not been hired).

The Tenth Circuit decision here conflicts with all of these cases.[8]

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[8] The panel majority misapprehended Sprint's argument on the Rule 403 issue. The majority characterized Sprint's argument to be "that the admission of evidence about other alleged episodes . . . would inconvenience Sprint." (Pet. App. 15a.) Sprint's actual argument focused not on inconvenience to *itself*, but on the burden on *the trial court and jury*, considerations of simple fairness, and on the other considerations that Rule 403 expressly makes relevant.

B. The Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On The Risk Of "Confusion Of The Issues, Or Misleading The Jury."

The admission of the disputed evidence risks confusion of the jury, because the proliferation of claims (and claimants) distracts the jury from a proper focus on the circumstances of the plaintiff. Here again the Tenth Circuit majority departed from the rule in other circuits. *See Williams*, 132 F.3d at 1130 ("me, too" testimony was both irrelevant and properly excluded under Rule 403 in any event; "[T]he testimony would have led to a confusion of the issues . . . ."); *Schrand*, 851 F.2d at 152 ("In addition to creating prejudice that substantially outweighed its probative value, the testimony tended to confuse the issue . . . . [T]here was a distinct danger that the jury would assume a connection that was never proven between the terminations of the two witnesses and that of Schrand."); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986) ("me, too" evidence "will often flunk Rule 403 because the acts are remote in time or place") (citing *Moorhouse*, 501 F. Supp. at 392-94); *Wyvill*, 212 F.3d at 303 ("By admitting this evidence, the district court substantially prejudiced [defendant] . . . . [These witnesses] distracted attention from the fact that they had little to say about [plaintiffs'] terminations.").

C. The Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On "Unfair Prejudice."

The disputed evidence risks unfair prejudice to the defendant employer, particularly in a reduction-in-force case. The essence of a reduction in force is that an adequately performing incumbent is released when the employer makes a judgment that it needs to cut back. Rarely can an employer defend a RIF case with overwhelming proof of an employee's incompetence or misconduct; if the employee were unfit for the job, he or she would have been discharged long before. *See, e.g., Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 924 (7th Cir. 1996) (affirming summary judgment; "These flaws [in performance] were not serious enough to call for [the employee's] immediate dismissal, but when [the company] was faced with the [need to reduce force] these flaws naturally figured into [the company's] decision regarding which service engineer to let go."); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 694 (7th Cir. 2006) ("Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual.").

It logically follows that any RIF plaintiff can present a plausible argument that he or she could have retained employment if only the decisionmaker had used other selection criteria or weighed them differently. Perhaps (he or she would argue) the company should have placed more (or less) weight on length of service. Perhaps the company should have placed more (or less) weight on the most-recent performance evaluation. Perhaps the company should have placed more (or less) weight on *prior*

performance evaluations. The possibility of second-guessing is endless. As a result, in any RIF axiomatically there will be attractive persons, not incompetent or unethical, each with a story to tell about how he or she sacrificed for the company, only to be released in an economically motivated cutback. Here, as noted, Sprint laid off more than 15,000 employees in a series of RIFs over more than 18 months. It is hardly surprising that Mendelsohn could find five other persons — 0.003% of that total — who would claim that Sprint selected them because of their age.

Juror sympathy to the individuals is inevitable, which is why Rule 403 exists. As the Sixth Circuit explained in *Schrand*:

> [T]he impact of the two former employees' testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided — whether [plaintiff] was discharged because of his age — this testimony embellished the circumstantial evidence directed to that issue .... [with] an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff]'s favor.

851 F.2d at 156.[9]

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[9] *Accord, e.g., Grayson v. K Mart Corp.*, 849 F. Supp. 785, 792 (N.D. Ga. 1994) (citing *Moorhouse*, 501 F. Supp at 392, in support of severing plaintiffs' individual ADEA claims; "[T]he 'prejudice resulting from permitting each witness, who is the plaintiff in his (Cont'd)

Armed with the plaintiff and a band of "me, toos," plaintiff's counsel in a layoff case will indict the company for committing management. For the trial to be fair, district judges must retain the discretion to declare that such proof, whatever its marginal probative value, is unfairly prejudicial. As the Second Circuit said in a similar case, reversing a jury verdict for plaintiff abetted with "me, too" proof: "'[E]ven the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age.'" *Haskell*, 743 F.2d at 122, *quoting Moorhouse*, 501 F. Supp. at 393 n.4.

The Tenth Circuit majority accorded the district court no evidentiary deference on this issue. Instead, the Tenth Circuit has required this judge, and all district judges in other cases, to admit all proffered "me, too" evidence regardless of the countervailing considerations set forth in Rule 403. That holding sharply departs from settled law elsewhere.

(Cont'd)
own lawsuit, to testify about the circumstances of his [demotion, would] substantially outweigh[] the probative value of the testimony,' under Rule 403.") (bracketed material in original).

CONCLUSION

The Tenth Circuit decision conflicts with decisions from at least five other circuits. Only the Eighth Circuit arguably agrees with the Tenth Circuit in holding relevant, and admissible notwithstanding Rule 403, "me, too" claims by persons lacking a nexus to the instant plaintiff. *Certiorari* should be granted to resolve that conflict.

Dated: March 5, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED NOVEMBER 1, 2006

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 05-3150.

Nov. 1, 2006.

Ellen MENDELSOHN,

Plaintiff-Appellant,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant-Appellee.

Before BRISCOE, BALDOCK, and TYMKOVICH, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Ellen Mendelsohn sued her former employer Defendant Sprint/United Management Company (Sprint), alleging Sprint unlawfully discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Mendelsohn alleged she was selected for termination on account of her age during a company-wide reduction in force (RIF). After a trial on the merits, a jury returned a verdict for

Sprint. At issue in this appeal is whether the district court erred in excluding testimonial evidence from former Sprint employees who alleged similar discrimination during the same RIF. We have jurisdiction under 28 U.S.C. § 1291. Because the evidentiary exclusion deprived Mendelsohn of a full opportunity to present her case to the jury, we conclude the district court abused its discretion in excluding the evidence. We reverse and remand for a new trial.

I.

Mendelsohn worked for Sprint from 1989 until November 2002, when Sprint terminated her as part of an ongoing company-wide RIF. At the time, Mendelsohn was fifty-one years old and the oldest manager in her unit. Mendelsohn brought her claim under the ADEA alleging Sprint selected her for the RIF based on her age. As evidence of Sprint's alleged discriminatory animus toward older employees, Mendelsohn sought to introduce evidence that Sprint terminated five other employees over the age of forty as part of the same RIF. These employees apparently believed they too were victims of age discrimination. Through their testimony as well as her own, Mendelsohn sought to introduce evidence of a pervasive atmosphere of age discrimination at Sprint.

Prior to trial, Sprint filed a motion in limine seeking to exclude, among other things, any evidence of Sprint's alleged discriminatory treatment of other employees. Relying exclusively on *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997), Sprint argued any reference to alleged discrimination by any supervisor other than Paul Reddick,

Mendelsohn's supervisor, was irrelevant to the issue in this case—i.e. whether Mendelsohn's age motivated Sprint to terminate her. Apparently persuaded by Sprint's argument, the district court granted the motion in part without much explanation, and limited Mendelsohn's evidence to "Sprint employees who are similarly situated to her."[1] To prove the employees were "similarly situated," the district court required Mendelsohn to show Reddick supervised the employees and Sprint terminated them in close temporal

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1. The district court, without the benefit of a proffer or a hearing, decided the motion by minute entry on the docket sheet. The entry reads:

> Paragraph 1 is SUSTAINED as to evidence that Sprint has a pattern and practice, culture or history of age discrimination. . . . Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for purposes of this ruling, requires proof that (1) Paul Ruddick [sic] was the decision-maker in any adverse employment action; and (2) temporal proximity.

We believe this approach lacking. As we previously have explained, district courts must be sufficiently detailed in their rulings so as to provide us with an understanding of the process the court used to reach its decision. Otherwise, we have difficulty reviewing the trial court's decision, in particular when our review is for an abuse of discretion. *See United States v. Roberts*, 88 F.3d 872, 882 (10th Cir. 1996) ("As an appellate court, we are in no position to speculate about the possible considerations which might have informed the district court's judgment. Instead, we require an on the record decision by the court explaining its reasoning in detail.").

proximity to Mendelsohn's termination. Because Reddick did not supervise any of the other employees Mendelsohn sought to place on the stand, the district court excluded their testimony at trial. Following the court's in limine ruling, Mendelsohn submitted in writing a proper offer of proof.

Following an eight-day trial, the jury returned a verdict for Sprint finding Sprint did not discriminate against Mendelsohn on the basis of age. Mendelsohn then filed a motion for a new trial renewing her objections to the district court's in limine ruling. *See* Fed. R. Civ. P. 50(b). The district court denied the motion, and Mendelsohn timely appealed.

II.

Mendelsohn argues the district court committed reversible error by requiring her to show she and the other employees shared a supervisor as a precondition for admissibility of their testimony. According to Mendelsohn, the testimony of other employees in the protected age group who were subject to substantially similar RIF terminations was relevant and admissible as reflecting on Sprint's discriminatory intent in selecting Mendelsohn to the RIF. Sprint, on the other hand, maintains any evidence of its treatment toward other employees is not relevant to the determination of this action because the evidence does not make it more likely that Sprint discriminated against Mendelsohn.

We review the district court's ruling to exclude evidence for an abuse of discretion. *See Whittington v. Nordam Group Inc.*, 429 F.3d 986, 1000 (10th Cir. 2005). Applying this

standard, we will reverse the district court only if it "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1122 (10th Cir. 2005) (citation omitted). An "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ." Fed. R. Evid. 103(a). Applying these standards, we agree with Mendelsohn that the evidence she sought to introduce is relevant to Sprint's discriminatory animus toward older workers, and the exclusion of such evidence unfairly inhibited Mendelsohn from presenting her case to the jury. *See, e.g., Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998) (identifying as a theory of pretext in RIF cases evidence of an employer's general policy of using a RIF to terminate older employees in favor of younger employees).

A.

To prevail on a discriminatory discharge claim under the ADEA, a plaintiff bears the burden of proving age was the motivating factor for the employer's decision to terminate her. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). As part of her proof, the plaintiff must persuade the jury that the employer's proffered reason for its conduct is unworthy of belief. *See Pippin v. Burlington Resources Oil And Gas Co.*, 440 F.3d 1186, 1193 (10th Cir. 2006). Because direct testimony as to the employer's mental processes seldom exits, *see Reeves*, 530 U.S. at 141, evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ("Other evidence that may be relevant to any showing of pretext includes ... [the employer's] general policy and practice with respect to minority employment."); *see also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 n. 2, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

We have previously recognized the testimony of employees, other than the plaintiff, concerning how the employer treated them as relevant to the employer's discriminatory intent. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990). For example, in *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), and *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991), we recognized evidence the employer had terminated other older employees was relevant as evidence of a pattern of dismissal based on age. Similarly, in *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776 (10th Cir. 1999), we found testimony of other employees regarding how defendant treated them relevant to the defendant's discriminatory intent where "testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motive."[2]

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2. Sprint points out Mendelsohn's proffered evidence resembles "pattern and practice" but she does not allege a claim for a pattern and practice of discrimination. Yet we have allowed evidence of a pattern and practice in individual cases of discrimination as circumstantial evidence of a defendant's discriminatory animus. *See, e.g., Greene*, 98 F.3d at 561; *Bingman*, 937 F.2d at 556-57; *see also Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University*, 245 F.3d 1172, 1177-78 (10th Cir. 2001).

Appendix A

Sprint would have us extend the "same supervisor" rule announced in *Aramburu* to this case. In *Aramburu*, we held *in the context of a discriminatory discipline action* that plaintiffs seeking to present testimony of other employees who were treated more favorably for violating the same work rule (or another of comparable seriousness) as evidence of discriminatory intent, must show they shared the same supervisor with the proffered witnesses. As we have observed elsewhere: "The 'same supervisor' test has been found to be relevant in cases involving allegations of discriminatory *disciplinary* actions." *Equal Employment Opportunity Comm'n v. Horizon/CMS Healthcare*, 220 F.3d 1184, 1198 n. 10 (10th Cir. 2000). In discussing *Aramburu*, we explained comparison of a supervisor's disciplinary action with other disciplinary action of the same supervisor is relevant to show the bias of the supervisor. For example:

> If X fires A, an Hispanic, for particular misconduct, but gives only a warning to B, a non-Hispanic, for identical misconduct, one might infer that something beyond the misconduct (such as a bias by X against Hispanics) motivated the disciplinary action. But if it was Y, not X, who decided not to impose a harsher sanction against B, one cannot infer that X's decision to fire A must have been motivated by something other than A's misconduct. X may simply have a less tolerant view toward misconduct than Y does. *Cf. Kendrick*, 220 F.3d at 1233 ("Different supervisors will inevitably react differently to employee insubordination.").

Rivera v. City and County of Denver, 365 F.3d 912, 922 (10th Cir. 2004). This case, on the other hand, is not about individual conduct but about a company-wide policy of which all Sprint's supervisors were allegedly aware. Accordingly, we decline to extend the "same supervisor" rule beyond the context of disciplinary cases.

Since deciding *Aramburu*, we have only applied the "same supervisor" rule in the context of alleged discriminatory discipline. *See, e.g., MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1277 (10th Cir. 2005); *Rivera*, 365 F.3d at 922; *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000). For example, in *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University*, 245 F.3d 1172 (10th Cir. 2001), a gender discrimination case, we declined to extend the application of the "same supervisor" rule beyond its original context. There we noted that while "in the context of allegations of discriminatory discipline, this court has looked to whether the plaintiff and others with whom he seeks to compare himself worked under the same supervisor," in the context of a faculty-wide policy, "the failure of the plaintiff and [the other witnesses] to share the same supervisor does not preclude the consideration of that evidence. . . ." 245 F.3d at 1177-78. Similarly, in *Horizon/CMS Healthcare*, a pregnancy discrimination case, we explained the "same supervisor" rule was not legally relevant to the inquiry of whether a plaintiff has been the victim of an allegedly discriminatory company-wide policy. 220 F.3d at 1198 n.10. Thus, the fact that plaintiff and the affiants did not share the same supervisor in that case did not preclude consideration of affiants' evidence.

Appendix A

Aramburu has no application where, as here, plaintiff claims to be a victim of a *company-wide* discriminatory RIF. Applying *Aramburu*'s "same supervisor" rule in the context of an alleged discriminatory company-wide RIF would, in many circumstances, make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence. Conceivably, a plaintiff might be the only employee selected for a RIF supervised by a particular supervisor. Meanwhile, scores of other employees within the protected group also selected for the RIF might work for different supervisors. In such cases, the constraints of *Aramburu* would preclude a plaintiff from introducing testimony from those other employees. Applying *Aramburu* to cases of discrimination based on an alleged company-wide discriminatory RIF would create an unwarranted disparity between those cases where the plaintiff is fortunate enough to have other RIF'd employees in the protected class working for her supervisor, and those cases where the plaintiff is not so fortunate. We do not think such disparity should exist.

B.

The testimony of the other employees concerning Sprint's alleged discriminatory treatment and similar RIF terminations is "logically or reasonably" tied to the decision to terminate Mendelsohn. *Spulak*, 894 F.2d at 1156 n.2 (upholding a district court's decision to allow former employees in the protected age group to testify about the circumstances surrounding their employment departure). In this case, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF. Although Mendelsohn and the other employees worked

under different supervisors, Sprint terminated all of them within a year as part of an ongoing company-wide RIF. All the employees were in the protected age group, and their selection to the RIF was based on similar criteria. Accordingly, testimony concerning the other employees' circumstances was relevant to Sprint's discriminatory intent.

According to the dissent, the evidence Mendelsohn proffered need not be admitted because it is "devoid of independent evidence showing that Sprint had company-wide discriminatory policies." Dissent at 1233. The dissent, however, does not explain what this independent evidence might be. In *Gossett*, we noted that evidence regarding the discriminatory application of an enterprise-wide policy by other supervisors was admissible when the plaintiff has "other evidence of that policy[.]" 245 F.3d at 1177. Thus, we required a plaintiff to proffer evidence, *other than her own testimony*, concerning the alleged application of said policy. In *Gossett*, the plaintiff satisfied this requirement by introducing an affidavit from a former student and professor concerning the application of the policy. *Id.* at 1177, 1179 n. 2.

Similarly, Mendelsohn in this case proffered independent evidence in the form of testimony from other Sprint employees who were similarly terminated during the RIF. The dissent mistakenly reads *Gossett* to require independent evidence apart from that evidence which Mendelsohn has proffered. Reading *Gossett* in such a manner may place an insurmountable evidentiary burden upon a claimant entitled to prove her case of age discrimination by circumstantial evidence. *See Merrick v. Northern Natural Gas Co., Div. of*

Enron Corp., 911 F.2d 426, 429 (10th Cir. 1990) (noting the ADEA does not require an employee to produce direct evidence of discriminatory intent; rather the employee only need show the employer's proffered justification is unworthy of belief). We respectfully disagree with the dissent's interpretation of *Gossett.*

Moreover, the dissent claims "the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination," because the district court admitted into evidence exhibits 3 and 4. Dissent at 1231-32. Those exhibits are a compilation of documents Sprint used during the RIF process that includes spreadsheets containing, among other data, the names and age of Sprint employees who were being considered for termination. In addition, the court permitted Jo Renda, Director of Human Resources, to testify concerning the use of these documents during the RIF process. With the exception of Mendelsohn, however, none of the employees identified in the spreadsheets testified at trial. The dissent fails to recognize the limited purpose for which the district court admitted this evidence as well as the distinct characteristic of the evidence the district court excluded in its ruling on the motion in limine.

Of particular relevance to the case was whether Sprint followed its own procedures when it selected Mendelsohn for the RIF. In fact, the district court denied Sprint's motion for summary judgment on this very issue. The district court made quite clear that exhibits 3 and 4 as well as Renda's testimony was allowed to come in for the purpose of determining Sprint's compliance with its procedures:

> [T]he reason I overruled your motion for summary judgment was because there was, I thought, sufficient evidence in the record that Sprint didn't follow its own procedures. I think that makes the whole process, you know, fair game, what was the procedure and was it followed? And if this spreadsheet was used as part of the implementation of the RIF and it has ages on it, then I think that it's fair game for the jury.
>
> * * *
>
> It was never my intention to preclude Plaintiff from putting on evidence about the RIF, how it worked, whether Sprint followed its own RIF procedures, et. cetera.

Aplt's Supp. Appx. at 88, 92-93. In response to Sprint's concerns regarding the improper use of this evidence the district court reiterated that its in limine ruling was aimed at excluding "other employees . . . from coming in and saying, I was RIF'd, it was because of my age" and that the ruling applied to this evidence. *Id.* at 93-94. The court made clear Mendelsohn's use of this evidence would have to conform to the in limine ruling. *See id.* at 55-56. Therefore, these exhibits were not offered for the purpose of showing pretext under the theory Sprint had a policy of favoring younger employees. Instead, the district court admitted this evidence under a different theory of pretext by showing Sprint did not follow its own RIF criteria. In addition, Jo Renda was able to use this evidence to find examples of older employees whom Sprint had retained, even though they were not

supervised by Reddick. Thus, the district court's in limine ruling disadvantaged Mendelsohn further because Sprint was allowed to portray itself as retaining older employees, aside from Mendelsohn, even though these employees were not all supervised by Reddick.

Admission of exhibits 3 and 4 did not remedy the error the district court made in excluding evidence concerning Sprint's alleged treatment of other employees and the circumstances surrounding their RIF termination. The nature of the evidence Mendelsohn proffered is vastly different from the evidence the jury considered—merely names and dates of birth. Evidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class. *See, e.g., McDonnell Douglas Corp.*, 411 U.S. at 804; *Aikens*, 460 U.S. at 713-14 n.2; *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102-03 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986). These other employees should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony.[3]

Generally, a court's evidentiary ruling is entitled to deference. *See Shugart v. Central Rural Elec. Co-op.*, 110

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3. We do not disagree with the dissent that statistical evidence to support an inference of an company-wide policy is useful, and perhaps quite convincing. *See* Dissent at 1232-33. But while "[s]tatisitical evidence may, in certain circumstances, be relevant to this purpose[,]" we have never required it. *Beaird*, 145 F.3d at 1168.

F.3d 1501, 1508 (10th Cir. 1997). But the court's discretion over evidentiary matters should not unfairly prevent a plaintiff a full opportunity to present her case. *See Gossett*, 245 F.3d at 1178. Blanket pretrial evidentiary exclusions, in particular, "can be especially damaging in employment cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990) (citation omitted). The evidence which Mendelsohn seeks to present, "is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation" for its motive in terminating Mendelsohn. *Greene*, 98 F.3d at 561. Age as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF.[4]

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4. The dissent characterizes the question of admissibility as a classic judgment call and readily acknowledges that had the district court admitted the evidence it would have acted within its discretion. The dissent, however, overlooks our established rule that a district court necessarily abuses its discretion "when it commits an error of law," *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006), or "fails to consider the applicable legal standard. . . ." *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). For instance, in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105-08 (10th Cir. 2002), we held the district court abused its discretion in decertifying a class of plaintiffs because the court failed to consider the "pattern and practice" legal framework applicable to the plaintiffs' claim of discrimination. In the same manner, the district

(Cont'd)

C.

Finally, Sprint argues the testimony should be excluded under Fed. R. Evid. 403. Rule 403 allows a district court to exclude relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence. Sprint argues that allowing the evidence would prejudice Sprint because it would result in Sprint having to defend multiple claims of discrimination. To be sure, the district court retains its power to limit cumulative and marginally relevant testimony. But otherwise, we disagree. Excluding otherwise admissible evidence under Rule 403 "is an extraordinary remedy [that] should be used sparingly." *United States v. Roberts*, 88 F.3d 872, 880 (10th Cir. 1996). "In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000) (internal quotations omitted). Little doubt exists that the admission of evidence about other alleged episodes of discrimination would inconvenience Sprint. But the fact Sprint would have to rebut this testimony is not in itself enough to outweigh the probative value of Mendelsohn's proffered evidence. *See Bingman*, 937 F.2d at

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(Cont'd)
court here abused its discretion when it excluded the testimonial evidence based upon its erroneous conclusion that *Aramburu* controlled the fate of the evidence in this case. *See also Floyd v. Ortiz*, 300 F.3d 1223, 1227 (10th Cir. 2002) (holding the district court abused its discretion in denying the plaintiff's request for rehearing because the district court relied on an erroneous legal premise to do so).

557. Based on the record before us, we cannot say the evidence is unduly prejudicial.[5]

Accordingly, for the reasons stated above the district court's order denying Mendelsohn's motion for a new trial is reversed. We remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.[6]

---

5. Sprint lastly argues any error the district court might have made was harmless because Ms. Mendelsohn did not have a submissible case of age discrimination. Based on the record before us, and in light of the evidence the district court excluded, we conclude Ms. Mendelsohn has a submissible case to present to the jury.

6. Nothing in our ruling is intended to limit the district court's discretion during trial to issue limiting instructions or rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced.

Appendix A

TYMKOVICH, Circuit Judge, dissenting.

I respectfully dissent because I do not believe the district court abused its discretion in its evidentiary rulings excluding testimony. At the outset, I agree that the district court's ruling is difficult to decipher, especially looking solely at the minute order. In the context of the trial, however, I think the court's ruling is clear enough—the proffered testimony from other employees failed to satisfy the relevancy and prejudice requirements of Rule 403. Moreover, I believe the majority makes a mistake in holding that testimony from other employees not similarly situated is admissible even where the plaintiff has made no independent showing of a company-wide policy of discrimination.

A.

A brief review of the evidence the court admitted will place its ruling in perspective. First, despite its pre-trial ruling regarding the witness testimony, the court admitted Exhibits 3 and 4, voluminous documents from Sprint's "succession planning" file, including notes on employees slated for termination pursuant to the company-wide RIF. Both exhibits show that Sprint kept information on the gender, ethnicity and age of employees alongside other information on their performance and perceived "potential." Significantly, Exhibit 4 also contains notes indicating that other workers over 40, who did not report to Reddick, were terminated as part of the RIF.

Second, the court also allowed testimony regarding the RIF dismissal of Marc Elster, one of Reddick's peers who

was 51 at the time of his termination. In addition, Jo Renda, a Sprint executive, was called as an adverse witness at trial and examined about the policies behind the RIF and the employees identified in Exhibit 4. She testified regarding fired employees who did not report to Reddick.

This evidence shows that the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination proffered by Mendelsohn. As the court explained in response to Sprint's objection to the admission of Exhibit 4,

> I'm afraid that you don't really comprehend what I was saying in the motion in limine—or on the motion in limine. It was never my intent to preclude plaintiff from putting on evidence about the RIF, how it worked whether Sprint followed its own RIF procedures, et cetera. I think because of the factual background of plaintiff's claim, we have to get into what happened to other employees.
>
> * * *
>
> [Defense counsel] wanted the court [via its order in limine] to prohibit other employees . . . from coming in and saying, I was RIF'd, it was because of my age and that sort of thing. So that's where I was targeting my ruling. And I stand by that ruling. I don't want that kind of evidence to come in. But I think that's a totally different question from the question whether the RIF, which is your stated

nondiscriminatory reason, is a pretext for age discrimination.

(Tr. at 93-94.)

Finally, in addition to admitting actual evidence of pretext, the district court rejected a jury instruction proffered by Sprint, which would have instructed jurors to consider only evidence about employees similarly situated to Mendelsohn. The court explained that evidence outside of Reddick's chain of command had been allowed to come in as relevant to the question of pretext: "The reason I said plaintiff could offer that sort of evidence was because it might yield an inference that the so-called legitimate nondiscriminatory reasons were pretextual." (Tr. at 1228.) Indeed, the court included an instruction that reminded the jury that it could, on the basis of all evidence presented at trial, reject Sprint's reasons for firing Mendelsohn and "conclude that plaintiff's age was a determining factor in [Sprint's] decision to terminate her employment." (Jury Instr. 12.)

In sum, it appears to me that the plaintiff had an adequate opportunity to introduce relevant evidence of Sprint's corporate policies and practices surrounding the RIF and argue that the RIF was itself a pretext for age discrimination. I am further convinced of this after studying the proposed testimony of the five witnesses proffered by Mendelsohn and excluded by the district court. Their proposed testimony seems a mixture of hearsay and speculation that would be marginally admissible in any event. I cannot say that the court erred in excluding such testimony under the standards of Rule 403.

To be sure, the testimony may have helped Mendelsohn's case. But this is not the question here. We are properly concerned with whether the court abused its discretion in excluding the testimony. I think not. This seems a classic judgment call. I readily admit that the court would not have erred in admitting the evidence, *see, e.g., Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990), but I am equally confident that the court did not abuse its discretion in choosing to exclude it.

B.

The larger problem with the majority's position is it suggests that anecdotal evidence from employees throughout a large organization will be *per se admissible* when offered in the context of alleged discrimination in a RIF. This appeal illustrates the hazard of such an approach for several reasons.

The first reason is the lack of any statistical or other direct evidence that supports an inference of enterprise-wide discrimination. Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had company-wide discriminatory policies. Even taking as true Mendelsohn's assertion that these witnesses would provide credible evidence that managers other than Reddick were motivated by discriminatory animus, this does not in and of itself support the conclusion that Reddick was

so motivated.[1] Nor does it establish that the RIF's "subjective criteria" was a pretext for age discrimination. While Sprint may well have had policies designed to discriminate against older employees, without more, the excluded testimony does nothing to establish that fact, nor does it directly support an inference that Mendelsohn's termination was wrongfully motivated. *See Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006) (discussing use of statistical evidence to support claim of disparate treatment). The evidence must tend to show that the company had a policy to discriminate, not merely a policy applied in a discriminatory manner by an individual supervisor or supervisors.[2]

---

1. Of the five proffered witnesses, one was fired a full year before Mendelsohn and another was *hired* at age 52. The others had grievances related to their supervisors that are too general to credit on this record.

2. This is not to suggest that some of the proffered evidence *might* be relevant. But having said this, the evidence must still satisfy the rules of evidence. It is not enough for a former employee to claim discrimination. We have always required a nexus between the testimony and the allegation, either through personal knowledge or statistical support. Without more foundation, in my view Mendelsohn has not demonstrated a Sprint-wide policy of discrimination embodied in the RIF. And none of the excluded evidence ties the policy to the decision to terminate her.

The majority relies on *Gossett v. Board of Regents*, 245 F.3d 1172 (10th Cir. 2001). But *Gossett* cannot be read broadly to suggest that any proffer of evidence is automatically admissible, without meeting the requirements of Rules 401 or 701. In that case, the court concluded the witnesses (at the summary judgment stage) claimed personal knowledge of the discriminatory policy and its application.

Appendix A

The second and more important hazard of the majority's approach is the narrow reading it gives to *Aramburu*. The so-called "same supervisor" rule articulated in that case recognizes that where an employee has putatively been fired for the violation of a workplace rule, an inference of discrimination is more likely where the same supervisor disciplines similarly situated employees differently. *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997).

But it is equally plausible that an employer could have a *company-wide* policy of using disciplinary actions as a pretext for unlawful discrimination. In such a case, I suspect we would modify the applicable relevancy standard in order to account for and allow evidence of a company-wide policy.

I would do the same in the RIF context and apply the *Aramburu* rule in cases like this one unless "independent evidence of specific enterprise-wide policy" has been developed. *Rivera v. City and County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004). Since Mendelsohn did not establish a foundation that the proffered evidence would support such a finding, and since she otherwise had the opportunity to present evidence to the jury of other older employees subject to the RIF, the district court did not abuse its discretion in excluding the additional witness testimony. [3]

---

3. The majority alternatively suggests that our "established rule that a district court necessarily abuses its discretion when it commits an error of law . . . or fails to consider the applicable legal standard" forces reversal here. Majority Op. at 12 n. 4 (internal quotations and citations omitted). Assuming, for the sake of argument, that this rule

(Cont'd)

Appendix A

Our holding to the contrary creates a rule that suggests even the most tangentially relevant and prejudicial testimony by former employees is per se admissible. Such a rule runs counter to our traditional deference to district courts as the primary arbiters of admissibility.

(Cont'd)
applies in the context of an evidentiary ruling and that the legal error in Mendelsohn's case was not harmless, all the rule would require is reversal and remand for application of the proper rule. The majority has not done this, but has instead insisted on finding Mendelsohn's proffered evidence to be per se admissible despite the evidentiary infirmities. The majority's note on the operation of our law regarding legal error is therefore logically incongruent with its holding that Mendelson's evidence must be admitted at a new trial.

APPENDIX B — MINUTE ORDER DATED JANUARY 3, 2005 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (KANSAS CITY) ENTERED ON CIVIL DOCKET NO. 2:03-cv-02429-KHV

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS (KANSAS CITY)

Civil Docket No. 2:03-cv-02429-KHV

Mendelsohn v. Sprint/United Management Company
Assigned to: District Judge Kathryn H. Vratil

ORDER sustaining in part and denying in part *78* Motion in Limine, and *84* Motion in Limine. . . . Paragraph 1 is SUSTAINED as to evidence that Sprint has a pattern and practice, culture or history of age discrimination (including through the Alpha rating or staff associate program); age discrimination litigation; and discrimination against employees not similarly situated to plaintiff. Paragraph 1 is otherwise OVERRULED. Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for the purpose of this ruling, requires proof that (1) Paul Ruddick was the decision-maker in any adverse employment action; and (2) temporal proximity. . . .

(Entered: 01/03/2005)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 16, 2007

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 05-3150
(D. Kan.)
(D.C. No. 03-CV-2429-KHV)

ELLEN J. MENDELSOHN,

Plaintiff-Appellant,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant-Appellee.

ORDER
Filed January 16, 2007

Before **TACHA**, Chief Judge, **BALDOCK**, **KELLY**, **HENRY**, **BRISCOE**, **LUCERO**, **MURPHY**, **HARTZ**, **O'BRIEN**, **McCONNELL**, **TYMKOVICH**, **GORSUCH**, and **HOLMES**, Circuit Judges.

Defendant Sprint/United Management Company (Sprint) has filed a petition for rehearing and rehearing en banc. A majority of the original panel has voted to deny Sprint's petition for rehearing. Judge Tymkovich would grant panel rehearing. A judge in regular active service called for a poll

on whether the case should be reheard en banc. Fed. R. App. P. 35(a). Voting has now been completed on that poll and only five of the twelve judges of this Circuit in regular active service (Circuit Judges Tacha, Hartz, Tymkovich, O'Brien, and Gorsuch) voted to rehear the case en banc. Accordingly, Sprint's petition for rehearing and rehearing en banc is DENIED.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

By s/ [illegible]
Deputy Clerk

APPENDIX D — STATUTE AND RULES INVOLVED

29 U.S.C.A. § 623

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14—AGE DISCRIMINATION
IN EMPLOYMENT

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

Appendix D

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

* * * *

(3) to discharge or otherwise discipline an individual for good cause. . . .

Appendix D

UNITED STATES CODE ANNOTATED
RULES OF EVIDENCE FOR UNITED STATES COURTS
AND MAGISTRATES
ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Supreme Court, U.S.
FILED
5/11/07
OFFICE OF THE CLERK

(3)

No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

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STATEMENT OF THE CASE

The Proceedings Below

Respondent Ellen Mendelsohn worked for Petitioner Sprint from 1989 until November 2002, when Sprint terminated her as part of an ongoing company-wide reduction in force. At the time, Mendelsohn was fifty-one years old and the oldest, most-experienced manager in her unit. Mendelsohn brought this action under the Age Discrimination in Employment Act, alleging that Sprint had selected her for the RIF because of her age. (Pet. App. 2a).

Before trial, Sprint filed a motion *in limine* to sharply limit the evidence Mendelsohn could introduce in support of her discrimination claim. Sprint argued that Mendelsohn should be barred from introducing evidence of discrimination by any company supervisor or manager except a single official, Paul Reddick. (*Id.*). Reddick purportedly had made the final decision for Sprint to select Mendelsohn for termination. The motion was directed in particular at preventing Mendelsohn from calling as witnesses 5 individuals whom Mendelsohn had listed as potential witnesses. All witnesses listed were individuals over 40 who had worked at the same Sprint headquarters in Kansas City as did Mendelsohn, and who had been terminated under the same RIF within a year of Mendelsohn's own dismissal. The disputed witnesses would have testified to facts similar to Mendelsohn, allowing the inference that they were victims of age discrimination. Sprint did not object to some specific portion of their proposed testimony; rather, it argued that Tenth Circuit case law created a blanket prohibition on

testimony about acts of discrimination by any Sprint official other than Reddick.[1]

The district court granted the motion, with scant explanation, allowing only evidence of discriminatory acts by Reddick, and barring any evidence "that Sprint has a pattern and practice, culture or history of age discrimination." (Pet. App. 3a). That Order preordained that the 5 disputed witnesses could not take the stand; it also precluded Mendelsohn herself from testifying that there was a general atmosphere of age discrimination at the headquarters campus.[2]

At the trial, Sprint elicited from its own witnesses testimony that a number of identified company workers who were over the age of 40 had *not* been terminated in the RIF.[3] This exculpatory evidence suggested that the company in fact had dealt fairly with workers above that age. Although some of the non-dismissed workers in question had not worked under Supervisor Reddick, the *in limine* Order precluded Mendelsohn from responding with evidence of discrimination against other older workers outside her immediate unit. The jury returned a verdict in favor of the employer.

The Tenth Circuit reversed. It held the admissibility of the testimony of the five disputed witnesses was governed by the rule that testimony regarding discrimination against other workers is generally admissible if it is "'logically or reasonably' tied to the decision to terminate Mendelsohn."

---

[1] Sprint argued this per se rule based on *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). (Pet. App. 2a).

[2] Pet. App. 3a, n. 1.

[3] (Exs. 3, 4) (Tr. 263-267).

(quoting *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 n. 2 (10th Cir. 1990)). The "[b]lanket pretrial evidentiary exclusio[n]" imposed by the district court was inconsistent with the requisite record-specific approach. After reviewing the substance of the proffered testimony of the disputed witnesses, the court of appeals concluded, "In this case, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF." (Pet. App. 9a).

Nature of the Excluded Testimony

Both the trial and appellate court had the entire depositions of the 5 proffered witnesses to see how their testimony "logically tied to" Sprint's motive as to Mendelsohn. All 5 had worked at (or near) the same Sprint headquarters in Kansas City, as Mendelsohn, and all had been dismissed within a year of Mendelsohn's termination. Bonnie Hoopes had been fired on the same day as Mendelsohn, and Sharon Miller had been fired on the very next day. (B. Hoopes at 49; Miller at 87). Several witnesses testified to overtly age-biased remarks that had been made by various supervisors at the facility.[4]

The circumstances in which those 5 witnesses had been dismissed was relevant in several specific ways to Mendelsohn's discrimination claim. A partial listing includes:

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[4] Bonnie Hoopes' supervisor, "told me I was too old for the job." (92-95); Sharon Miller's supervisor complained of "too many older people" in the department, including Yvonne Wood (25-26; 29-33; 45-47; 50; 58). Miller's supervisor was waiting for layoffs to clean the department. (*Id.*, 27; 59).

(1) Prior to her dismissal Mendelsohn had received uniformly high ratings on the company's "Numeric" evaluations, which were disclosed to employees.[5] Sprint changed in late 2001, to a "secret" set of evaluations, known as "Alpha" or "shadow" ratings, which were not to be disclosed to workers, but which also were not supposed to be used in making termination decisions.[6] Despite that rule, Mendelsohn, who had received an "Improvement Needed" rating under the secret alpha system, was dismissed on the basis of that alpha rating. (Tr. 978-81; 1020). Several of the other alleged discrimination victims would have testified that the "secret" "alpha" forced ranking system was also improperly used to dismiss them.[7]

(2) When Mendelsohn was dismissed, no objective reason was given to fire her. (Tr. 619). A "workforce reduction" was the supposed reason. (*Id.*). In fact her job was simply filled by another, younger worker.[8] Several of the other older employees similarly would have testified that they too were given the false prextual explanations for their dismissal.[9]

(3) Paul Reddick had no direct supervisory role over Ellen Mendelsohn from June 2002 through year end. (Tr. 1097-98).

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[5] Tr. 463-504; Exs. 63-69.

[6] Tr. 43-49 (testimony of Jo Renda).

[7] John Borel Depo. 40-42; 46-47; John Hoopes, at 37; Bonnie Hoopes, at 50-51.

[8] 33-year-old Whitney Siavelis replaced Mendelsohn (Tr. 176; Ex. 4). She had never worked in MFS. (Tr. 1184).

[9] B. Hoopes (50-51); J. Hoopes (34-36); John Borel (34-36).

Jim Fee, Mendelsohn's immediate supervisor, who rated her performance highly in 2002 and had talked of firing younger co-worker Mike Bauerle (Tr. 509), was **never** consulted about whom to dismiss (Tr. 832-34). The decision was made by Reddick, who knew far less about Mendelsohn's work.[10] Similarly, John Borel testified his supervisor said "she was forced to give him" an adverse rating. (40-42).

(4) At trial, a Sprint witness testified that upper-level company management "had no idea" about the ages of the workers who were being terminated.[11] This was so, they claimed, despite age data contained within various exhibits. (Exs. 3; 4; Tr. 127-131). In the absence of such knowledge, those managers could not have known (so they asserted) that when Mendelsohn was dismissed she was the oldest manager in her unit. (Tr. 1027). Yvonne Wood would have testified, to the contrary, that she inadvertently received a spreadsheet listing the ages of the workers to be dismissed, and it was distributed to her supervisors. When that inculpatory spreadsheet was inadvertently given to the witness, company officials had demanded that it be returned.[12]

(5) The company's official "**mandatory**" "Displacement Guidelines" provided that a worker's length of service was to be considered in selecting employees to be dismissed in the

---

[10] Reddick admitted he personally did not have day-to-day supervisor responsibility for Mendelsohn during all of 2002. (Tr. 1097-98).

[11] Blessing, at 1027; 1045.

[12] Wood, at 48-51; 77-78.

RIF.[13] Mendelsohn had far more seniority than the workers who were retained in her unit.[14] But Jo Renda testified that length of service "is just a number." (Tr. 124). Several of the other alleged discrimination victims would have testified that they also were dismissed and replaced by younger lesser experienced employees, despite having greater length of service.[15]

In short, Ellen Mendelsohn was falsely portrayed as an isolated case -- the one supposedly "weaker" worker being RIF'd. Defendant even told the jury Ellen Mendelsohn "was the only person over 40 without a job because of this reduction in force." (Tr. 1364) But "age" motivation becomes "more probable" by **receiving** evidence that shows other older employees over 40 suffered Ms. Mendelsohn's fate in the same RIF; under the same policies. The jury expects to see a "pattern" of older employee dismissals, and when they don't, it is easier to accept defendant's non-discriminatory explanations.

To compound the unfairness, with plaintiff robbed of allowable evidence of Sprint's "pattern" of dismissals of well-performing older workers, defendant had free rein to argue:

> "There is usually some sort of pattern to those actions that tends to show age discrimination. There is none of that here. There is absolutely no evidence that Paul

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[13] Ex. 17 (Resp. App.)

[14] Tr. 123-24; 208-209.

[15] Bonnie Hoopes at 82-83; John Hoopes at 25-29.

> Reddick ever did anything based on age in his career at Sprint. (Tr. 1345-46).

The only reason there was no evidence of the traditional "pattern" is it was wrongly excluded. But the unfair drumbeat about Reddick was pounded out again (Tr. 1364):

> This is where you would see a pattern if somebody is an age discriminator . . . . If Paul Reddick was just walking around making decisions based on age, he would have gotten rid of the older employees ....

Defense counsel also was able to argue from spreadsheets admitted into evidence that younger employees in totally dissimilar jobs to plaintiff – and not supervised by Reddick – were also RIF"d; and that dissimilar older employees – not supervised by Reddick – were "accepted into his department as part of the reduction in force." (Tr. 1363-64). The *Mendelsohn* Opinion insightfully points up the unfair whipsaw wrought by the evidentiary exclusions.

Without testimony from other similarly situated employees, who similarly suffered sudden drops in performance evaluations after the "bell curve" forced ranking, the defendant was able to dismiss it as "a red herring." (Tr. at 1357) But the fact the new forced ranking system was secretly misused adversely against not only Ellen Mendelsohn – but also Bonnie Hoopes, John Hoopes and John Borel – makes a finding of "procedural irregularities" or pretext "more probable" than without the evidence.

Pretrial Conference Jan. 29, 2007: Sprint Would Not Be Calling Additional Witnesses Upon Retrial

This case was set for trial on February 6, 2007. In the Pretrial Conference held January 29, 2007, the court announced that the evidence submitted to the Tenth Circuit would be "frozen," meaning no additional discovery nor supplementation of Rule 26 witness and exhibit lists. Sprint did not object. Sprint did not intend to call any witnesses to contradict the testimony of the 5 witnesses proffered by plaintiff, because none had been listed in required Rule 26 Disclosures. Plaintiff years ago had listed all such witnesses on her disclosures.

REASONS FOR DENYING THE WRIT

This case presents a routine, fact-bound application of the generally accepted rule that anecdotal evidence of other discriminatory acts or remarks may, in some but not all cases, be relied on to prove that a particular employment action was motivated by an impermissible purpose.

Petitioner suggests that circuit courts have fashioned special legal rules for a distinct category of anecdotal evidence, which those courts label "me, too" evidence.[16]

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[16] It is unclear whether by "'me, too' evidence" petitioner means: (1) any testimony about discrimination against a witness (other than the plaintiff); (2) testimony about discrimination against a witness (other than the plaintiff) where the witness and the plaintiff were (assertedly) discriminated against by different officials (that would be "'me too, but someone else did it' evidence"); or (3) testimony about discrimination against a witness (other than the plaintiff) where the witness and the plaintiff were (assertedly) discriminated

According to petitioner the Tenth Circuit recognizes the existence of something it labels "me, too" evidence, and requires that such evidence be admitted in all cases; other circuits supposedly also utilize that nomenclature, but have adopted a per se bar to "me, too" evidence.

As we explain below, this characterization of the holdings of the Tenth and other circuits is incorrect. Petitioner's description of the language of those decisions also is not correct. Petitioner suggests there is a substantial body of appellate decisions referring to something federal judges call "me, too" evidence. The widespread use of such a phrase by the courts of appeals, if it indeed occurred, might at least suggest those courts were addressing some distinctive type of evidence which they regarded as presenting a recurring, discrete legal question. Petitioner suggests that has indeed occurred, quoting the phrase "me, too" evidence about 40 times in its petition, including in summaries of federal court decisions. In fact, however, **not a single one** of the decisions cited by petitioner ever uses that phrase. The only actual usage of this phrase identified by petitioner is in a 1996 book edited by petitioner's own counsel.[17]

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against by different officials *and* there were no significant similarities or other connections between the two asserted acts of discrimination.

[17] 1 B. Lindemann & P. Grossman, Employment Discrimination Law 30 (3d ed. 1996). The editor in-chief of the book is Paul W. Cane, Jr., the counsel of record for petitioner. *Id.* at xix. That book referred to "so-called 'me, too' evidence," without explaining *who* had so characterized the type of evidence in question. The footnotes in the book quote the phrase "me, too" in the parenthetical summaries of four federal decisions. None of those

I. The Tenth Circuit Has Not Adopted A Per Se Rule Requiring Admission Of All Anecdotal Evidence Of Other Discriminatory Acts.

The Tenth Circuit, like other courts of appeals, addresses on a case-by-case basis the relevance of anecdotal evidence of other discrimination. In the Tenth Circuit, as elsewhere, whether the anecdotal evidence is about actions or statements by an official different than the plaintiff's own supervisor is *a factor* bearing on the relevance of that evidence, but that circumstance is not the sole factor considered and is not invariably dispositive.

Petitioner asserts the Tenth Circuit always *requires* the admission of any and all anecdotal evidence involving an official other than the supervisor of the plaintiff. (Pet., 5, 6, 15, 21). Not true. For 17 years the Tenth Circuit, in a manner consistent with the approach in other circuits, has held that anecdotal evidence (including evidence regarding such other officials) is relevant only if the plaintiff can show that the evidence "could logically or reasonably be *tied to* the [allegedly discriminatory] decision." *Spulak v. K Mart Corporation*, 894 F.3d 1150, 1156 n. 2 (10th Cir. 1990)

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cases, however, used the phrase at all. *Id.* at 30 nn. 115-17. We have been unable to find any federal decision before the publication of this book that in fact used this phrase.

This book apparently uses the phrase "'me, too' evidence" to refer to any testimony about discrimination against a person other than the plaintiff, including asserted discrimination by the same supervisor. See n. --, *supra*. Much of the petition would make no sense, however, if that is what petitioner means by "'me, too' evidence."

(quoting *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988))(emphasis added).

In *Spulak* the Tenth Circuit upheld the decision of the district court to admit anecdotal evidence regarding an official other than the plaintiff's supervisor. The court of appeals did not (as petitioner suggests) hold the admission of that evidence was mandatory, but ruled only that the district judge in admitting the evidence had not abused his discretion. *Id.*, at 1156. The Tenth Circuit recognized the significance of the fact that two different supervisors were at issue,[18] but concluded that the district judge could find that circumstance was outweighed, *inter alia*, by the similarity of "the circumstances under which" the plaintiff and the witness were fired. 894 F.2d at 1156 n. 2.

On the other hand, applying the same "tied to" requirement, the Tenth Circuit approved the exclusion of anecdotal evidence in *Curtis v. Oklahoma City Public Schools Board of Education*, 147 F.3d 1200 (10th Cir. 1998). In upholding the exclusion of that evidence, the court of appeals noted *inter alia* that the witness in question had largely (although not exclusively) been under the supervision of a different official. 147 F.3d at 1218. In *Curtis*, in addition to this factor, there were "a number of dissimilarities" between the situation of the plaintiff and that of the proffered witness. Similarly, in *Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999), the Tenth Circuit upheld the decision of the district court to exclude the testimony of a former employee who asserted that he (like the plaintiff in that case) had been retaliated against for complaining about discrimination. The

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[18] 894 F.2d at 1156 n. 2 ("*Although* they worked under a different district manager")(emphasis added).

court of appeals reiterated the "tied to" requirement, making clear that evidence regarding the treatment of other employees was sometimes but not invariably relevant:

> The testimony of other employees about their treatment by the defendant employer is relevant to the issue of the employer's discriminatory intent *if* the testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motives.

165 F.3d at 776 (emphasis added). With regard to the particular anecdotal evidence in that case, the Tenth Circuit held that this standard had not been met. The district judge, the court of appeals ruled, could reasonably have concluded that the proffered testimony was not sufficiently reliable and probative. *Id.*

Mendelsohn is an unremarkable application of this record-specific approach. The panel below reiterated the "tied to" requirement, emphasizing that testimony regarding the treatment of other employees is not always relevant, but rather is relevant when it "establishes a pattern of [discriminatory] behavior or tends to discredit the employer's assertion of legitimate motive." (Pet. App. 6a). The court of appeals concluded, "*In this case*, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF." (*Id.*, at 9a) (emphasis added).

The Tenth Circuit identified 5 considerations that tied the testimony of those other employees to Mendelsohn's claim. Because of those factors, the court of appeals reasoned, the proffered testimony supported — although not conclusively — Mendelsohn's efforts to discredit the employer's proffered

explanation for the decision to terminate Mendelsohn: (1) The decision to terminate Mendelsohn was not an isolated dismissal initiated by her supervisor; it was part of the same ongoing "company-wide RIF" that led to the dismissal of the other employees. (*Id.* at 10a). (2) The other employees, all of whom — like Mendelsohn — worked at the same Sprint headquarters in Kansas City, had been terminated within a year of Mendelsohn's dismissal (*Id.*); One proffered witness (Bonnie Hoopes) had been dismissed on the same day as Mendelsohn, and another (Sharon Miller) the very next day. (See Stmt. of Case, supra); (3) The criteria used to select for dismissal both Mendelsohn and the proffered witnesses were similar.[19] (Pet. App. at 10a); (4) A company witness (HR Manager Jo Renda) had put the treatment of "other employees" in dispute by testifying on behalf of the defendant that there were examples of other Sprint employees who were not dismissed, identifying a number of workers over 40 who (like the proffered witnesses) did not work under Mendelsohn's supervisor or Reddick. (*Id.* at 11a). (5) The proffered testimony (including the testimony about age-biased remarks by supervisors) tended to show "an atmosphere of age discrimination." (*Id.* at 14a).

The Tenth Circuit opinion, far from insisting that all anecdotal testimony must invariably be admitted, held only that the district court *in this case* had erred in adopting a "[b]lanket pretrial evidentiary exclusio[n]" of any testimony by workers who served under an official other than Mendelsohn's own supervisor. (*Id.* at 14a). The panel emphasized that even in the instant case the district court on

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[19] The company-wide mandatory Displacement Guidelines (Ex. 17); The "Numeric" to "Alpha" Performance Management System.

remand retained the power to limit on a more narrow basis the testimony of those witnesses:

- These other employees should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony. (*Id.* at 13a).

- To be sure, the district court retains its power to limit cumulative and marginally relevant testimony. (*Id.* at 15a).

- Nothing in our ruling is intended to limit the district court's discretion during trial to issue . . . rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced. (*Id.* at 16a, n. 6).

The dissenting opinion illustrates the fact-bound nature of the dispute in the court of appeals. The dissenting judge wrote, "I readily admit that the court would not have erred in admitting the evidence." (*Id* at 20a). The dissent argued only that the testimony of the 5 co-workers was not very persuasive (*Id.* at 20a), and that the decision to admit or exclude that evidence should thus have been left to the district judge. (*Id.*).

The petition describes the anecdotal evidence in this case in terms which omit the probative aspects of that evidence (Pet. at 3-4). The Tenth Circuit, relying on important aspects of that evidence ignored by petitioner, concluded that it was indeed relevant. These fact-bound disputes about the persuasiveness of the excluded testimony do not present an issue warranting review by this Court.

II. The Decision Of The Tenth Circuit Is Not In Conflict With The Standard Applied In Other Circuits.

The Tenth Circuit's case-specific approach, assessing in each instance whether and how anecdotal testimony would provide support for a plaintiff's claim of discrimination, is consistent with the practice in other circuits.

The First Circuit took the same approach in *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001):

> [E]vidence of a discriminatory "atmosphere" may sometimes be relevant in showing corporate state-of-mind at the time of that termination. . . . [The employer] challenges the relevancy of the testimony on the ground that it covered different time periods, different supervisors, and different areas of the company. It is true that evidence of discrimination can be "too attenuated" to justify submission. . . . However, "evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific claim [at issue.]

265 F.3d at 63 (quoting *Conway v. Electro Switch Co.*, 825 F.2d 593, 597-98 (1st Cir. 1987)). The First Circuit in *Cummings* concluded that under the particular circumstances of that case the testimony of co-workers, even though not involving the same supervisor as that of the plaintiff, could "provid[e] a basis for reasonable inferences related to the plaintiff's claim." 265 F.3d at 63.

In the Eighth Circuit, the admissibility of such anecdotal testimony of discrimination against other employees is

assessed in light of the circumstances of each case. *Compare Philip v. ANR Freight Systems, Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991)(overturning exclusion of testimony concerning discrimination against other employees)[20] and *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 156 (8th Cir. 1990)(same),[21] *with LaClair v. City of St. Paul*, 187 F.3d 824, 828 (8th Cir. 1999)(upholding exclusion of testimony concerning discrimination against other employees), and *Callanan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996) (same).

> Circumstantial proof of discrimination [against other workers] typically includes unflattering testimony about the employer's history and work practices . . . . [S]uch background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1003 (8th Cir. 1988).

Similarly, in the Seventh Circuit the admissibility of testimony regarding discrimination against other employees

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[20] 945 F.2d at 1056 ("an employer's background of discrimination is indeed relevant to proving a particular instance of discrimination.")

[21] 900 F.2d at 155-56 ("Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.")

depends on the particular circumstances of each case. Judge Posner observed in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986),

> Given the difficulty of proving employment discrimination — the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles — a flat rule that evidence of other discriminatory acts by . . . the employer can never be admitted . . . would be unjustified. Such evidence will often flunk Rule 403 because the acts are remote in time or place . . . *but not in all cases, and not in this one*. (emphasis added).

797 F.2d at 1423. Applying this case-specific approach, the Seventh Circuit in *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93 (7th Cir. 1985), held that testimony by two co-workers that they (like the plaintiff) were the victims of age discrimination provided support for the plaintiff's own claim. 770 F.3d at 97-98.

Petitioner asserts the Third Circuit has held that testimony regarding the treatment of other employees is *never* admissible where those employees were subordinates of an official other than the plaintiff's own supervisor. (Pet. 11, 14). The only Third Circuit decision cited by petitioner, however, is the summary affirmance in *Moorhouse v. Boeing Co.*, 639 F.2d 774 (3d Cir. 1980). The Third Circuit decision relied on by petitioner reads, in its entirety, as follows: "Affirmed." Obviously, that decision contains no rule of law at all; indeed, it is impossible to ascertain what issues were even raised in the appeal.

The Third Circuit did address this issue in *Glass v. Philadelphia Electric Co.*, 34 F.3d 188 (3d Cir. 1994),

endorsing the record-specific standard utilized in the First, Seventh and Eighth Circuits. *Glass* overturned the action of the district judge in prohibiting testimony about prior discrimination against the plaintiff by other officials at a different facility:

> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives . . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices . . . . In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employee was more likely than not to have acted from an unlawful motive.

34 F.3d at 195 (quoting *Estes v. Dick Smith Ford, Inc.*, *supra*). The Third Circuit cited with approval the admission of such anecdotal testimony in *Hawkins v. Hennepin Technical Center*, *supra*, and *Hunter v. Allis-Chalmers*, *supra*. In *Becker v. Arco-Chemical Co.*, 207 F.3d 176 (3d Cir. 2000), the Third Circuit indicated agreement with

> numerous cases which have held that, as a general rule, evidence of a defendant's prior discriminatory treatment of a plaintiff *or other employees* is relevant and admissible . . . to establish whether a defendant's employment action against an employee was motivated by invidious discrimination. . . . . In those cases, the courts admitted the evidence because of the discriminatory nature of the prior conduct, which in

> turn tended to show the employer's state of mind or attitude toward members of the protected class.

207 F.3d at 194 n. 8 (emphasis added).

Petitioner asserts there is "clear dictum" in the Fourth Circuit precluding use of anecdotal testimony from workers who had different supervisors than the plaintiff. (Pet. 14). The case cited by petitioner, *Honor v. Booz-Allen & Hamilton, Inc.*,, 383 F.3d 180 (4th Cir. 2004), contains nothing to support this assertion. The portion of *Honor* cited by petitioner concerned a hostile work environment claim. The plaintiff did not claim he personally had been subject to racial harassment, but asserted that only other employees had been subject to such treatment. The Fourth Circuit, in rejecting that argument, simply applied established law requiring an harassment plaintiff to show that *his* environment was a hostile one. Honor's harassment claim did not turn on the motives of the employer, and thus the probativeness of anecdotal evidence to establish motive simply was not at issue in that case. Petitioner's reliance on *Honor*, explained only obliquely in footnote 4 of the Petition, evidently rests on that fact that the Fourth Circuit, after the signal "see also", cited two cases dealing with anecdotal testimony. 383 F.3d at 190. But that signal indicates that the court regarded the cited cases as only tangentially related to the question actually being decided.

In *Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003), on the other hand, the Fourth Circuit "cited favorably" a series of decisions in other circuits approving the use of "evidence of similar acts of discrimination, or other acts which reveal a discriminatory attitude." 77 Fed. Appx. at 147-48 (citing *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), *Hunter v. Allis-Chalmers Corp.*, 797 F.2d

1417 (7th Cir. 1986), and *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988)).

Petitioner relies heavily on the Second Circuit decision in *Haskell v. Kaman Corp.*, 743 F.3d 113 (2d Cir. 1984), which petitioner describes as "oft-cited." (Pet. 8). The dispute about the anecdotal evidence in *Haskell*, however, had nothing to do with the identity of the supervisors involved; the opinion does not even indicate whether the witnesses served under an official other than plaintiff Haskell's supervisor. The Second Circuit's objection in *Haskell* was not that the plaintiff was trying to rely on testimony by other alleged victims of discrimination, but that the plaintiff had called *too few* such witnesses. The plaintiff had sought to prove that discrimination was so widespread that it was the employer's standard operating procedure, and was therefore sufficient by itself to demonstrate that Haskell too was the victim of discrimination. *See Teamsters v. United States*, 431 U.S. 314, 362 (1977) (proof of systemic discrimination creates presumption of discrimination against all members of the targeted group). Proof of discrimination against other workers is a (if not *the*) method of proving such a systemic practice, but the Second Circuit concluded that Haskell had called too few such witnesses:

> The sample in the present case of ten terminations over an 11-year period is not statistically significant, particularly against a background indicating that most of the Company's many officers . . . were more likely than not in the protected age bracket (40 to 70 years) . . . . The courts have consistently rejected similar statistical samples as too small to be meaningful.

743 F.3d at 121. *Haskell* is "oft-cited" for the proposition that proof of systemic discrimination requires a larger sample

size, not for any rule about the identity of the supervisors involved.[22]

The Second Circuit in *Haskell* also objected that the testimony of the witnesses in question was insufficient to establish that even they had been the victims of discrimination:

> Some witnesses were improperly permitted to give subjective evaluations of their own and of their fellow officers' performance without furnishing the bases for their evaluations. . . . Two of the 10 discharged officers were never replaced. Five were replaced by *older* persons and one by a person only eight months the discharged officer's junior. Under these circumstances their testimony, aside from presenting unnecessary collateral issues, provided "no basis for an inference of discrimination."

743 F.2d at 121 (citation omitted; emphasis added). In *Mendelsohn*, on the other hand, petitioner has not (yet) questioned the sufficiency of the proffered testimony to prove that the witnesses were the victims of discrimination.[23]

The petition mischaracterizes the opinion in *Haskell* in a way that suggests that the passage quoted above actually

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[22] *E.g., Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 546 n. 5 (S.D.N.Y. 2005); *Weser v. Glen*, 190 F. Supp. 2d 384, 402 (E.D.N.Y. 2002); *Shkolnik v. Combustion Engineering, Inc.*, 856 F. Supp. 82, 87 (D.Ct. 1994).

[23] Petitioner's consistent position has been that "other employee" testimony is irrelevant if not connected to Reddick.

meant that proof of discrimination against the witnesses, however persuasive, would not support a finding that plaintiff Haskell was also a victim of discrimination. Omitting the court's explanation of the defects in that testimony, the petition recasts the holding of the Second Circuit as follows:

> "[T]heir testimony, aside from presenting unnecessary collateral issues, provided 'no basis for an inference of discrimination,'" *because the circumstances of the six others bore no logical relationship to the plaintiff.*

(Pet., 8) (emphasis added). Petitioner's "no logical relationship" explanation of the Second Circuit opinion is inaccurate; the defect in the testimony identified by the Second Circuit was not that the testimony (even if credible) bore no relationship to the plaintiff's claim of discrimination, but that the testimony was insufficient to show that even the witnesses themselves had been the victims of discrimination.

Petitioner asserts that the Sixth Circuit has adopted a per se rule excluding *all* anecdotal testimony involving an official other than the plaintiff's own supervisor. (Pet. 10-11). In *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997), the Sixth Circuit held that anecdotal evidence would be admissible if it had some "apparent connection" with the plaintiff's claim — a formulation similar to the Tenth Circuit "tied to" standard. 132 F.3d at 1130. The Sixth Circuit then listed six circumstances in that case which, taken in concert, convinced the court that the proffered testimony (about an earlier alleged incident of hiring discrimination) was not relevant: (1) the earlier incident occurred 6 years before the plaintiff was rejected for employment, (2) the earlier application involved a different position, (3) the two positions had different qualifications, (4) the two positions had distinct hiring requirements, (5) the two incidents did not involve

similar assertedly pretextual explanations, and (6) the applications were reviewed by different officials. 132 F.3d at 1130. The decision in *Williams* that the prior incident was not relevant was based on consideration of all these factors combined, together with the plaintiff's failure to point to any type of connection between the two asserted incidents of hiring discrimination. *Williams* cannot conceivably be read as adopting six (6) per se rules, under which every one of these factors would by itself, in all circumstances, bar anecdotal testimony. For example, even in petitioner's view, the fact that different positions were involved would not render irrelevant the testimony of that other applicant if the decisions had been made on the same day by the same supervisor giving the same (assertedly pretextual) explanation. The fact that different officials were involved in *Williams* was simply one of six factors, none more conclusive than any of the others, relied on by the court.

The other Sixth Circuit case relied on by petitioner, *Schrand v. Federal Pacific Electric Co.*, 851 F.3d 152 (6th Cir. 1988), far from establishing any per se rule limiting anecdotal testimony to evidence regarding the plaintiff's own supervisor, instead formulates the very "tied to" standard cited and adopted by the Tenth Circuit in *Spulak* and applied by the Tenth Circuit in *Mendelsohn*. In determining the admissibility of anecdotal testimony, the question was whether there was "evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision [in dispute."] 851 F.2d at 152. In holding such standard was not met in *Schrand*, the Sixth Circuit noted that the two witnesses had worked in New Jersey and New Mexico, "places far from the plaintiff's place of employment" in Ohio,

and had served under different supervisors.[24] It was that combination of circumstances, together with the failure of the plaintiff to point to some sort of relationship among these incidents, that led to the Sixth Circuit's conclusion that the testimony in *Schrand* was inadmissible. As in *Williams*, *Schrand* does not purport to adopt *several* per se rules. Instead it merely considers the combined effect of several circumstances. If each of the factors in *Schrand* were itself a per se rule, that decision would bar introduction of evidence that a single manager, on the same day and giving the identical (assertedly pretextual) explanation, had fired a series of over-40 employees, so long as the simultaneously-dismissed subordinates had worked in several different states.

The Fifth Circuit has dealt with anecdotal evidence in a somewhat ad hoc manner, endorsing its use in some cases, *e.g. Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1110 (5th Cir. 1995)[25], and *Harpring v. Continental Oil Co.*, 628

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[24] All of Mendelsohn's proffered witnesses worked in Kansas City.

[25] 49 F.3d at 1109-10 ("To the extent that [the defendant] contests the admission of evidence of age discrimination against other employees, it misconstrues the law. There is no prescription of evidence of discrimination against other members of the plaintiff's protected class; to the contrary, such evidence may be highly probative, depending on the circumstances.") *Shattuck* cites *Hawkins v. Hennepin Technical Center*, 900 F.2d 152 (8th Cir. 1990).

F.2d 406 (5th Cir. 1980)[26], while rejecting that evidence in others.

The Fifth Circuit decision in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000), illustrates the fact-bound nature of deciding relevance of anecdotal testimony. In *Wyvill* the same supervisor had in fact been involved in terminating both a plaintiff and at least one of the witnesses who testified about his own earlier discriminatory dismissal. 212 F.3d at 303 (supervisor Phillips was involved in the terminations of both the witness and plaintiff Waldrop); *see id.* (plaintiff and one or more witnesses had all been supervised at one time by D.C. Brantley). A second plaintiff had a different immediate supervisor than his witnesses, but those witnesses did have experience with a manager (Spann) who had participated in the decision to fire that plaintiff. 212 F.3d at 303. The Fifth Circuit concluded that the anecdotal testimony of these witnesses should have been excluded, despite the fact that the witnesses had testified about several of the very company officials involved in terminating the two plaintiffs. The court of appeals held the testimony was inadmissible because the witnesses themselves had held different jobs with different duties than the plaintiffs, had been dismissed under different circumstances with different explanations, and in several instances did not even work for the same company as the plaintiff. 212 F.3d at 302-303. The anecdotal evidence in *Wyvill* thus included evidence regarding the actual decisionmakers involved in dismissing the two plaintiffs in that case; the Fifth Circuit decision rejecting that evidence necessarily rested on other considerations.

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[26] 628 F.2d at 409 ("It is clear that the testimony of the similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of age discrimination.")

In sum, the Tenth Circuit has not adopted a per se rule requiring admission of all anecdotal testimony from witnesses who work under a different supervisor than the plaintiff, and the other court of appeals do not apply a blanket prohibition — regardless of all other circumstances — to all anecdotal testimony from such witnesses. In practice the evaluation of anecdotal evidence remains, as it should be, a record-bound process turning on the various circumstances of each particular case.

III. *Mendelsohn* Simply Does Not Hold That Anecdotal Evidence Always Must Be Admitted. There Is No Circuit "Conflict" On This Fact-Bound Determination.

As fully explained in Parts I and II herein, *Mendelsohn* does not announce a "per se" rule requiring admissibility. Thus, the false premise underlying Point II of the petition disappears. Second, Petitioner's hypothetical "undue delay" arguments also disappear for the case-specific reason here that Petitioner announced it was not intending to call any new or additional witnesses upon retrial.[27]

The Tenth Circuit's law on Rule 403 is consistent with law everywhere in holding:

> In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. (Pet. App., at 15a).

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[27] *See* Statement of The Case, *supra*.

There was no proper Rule 403 "balancing" per the foregoing in the district court, but only arbitrary exclusion without hearing or adequate explanation — a double whammy against plaintiff: (1) No acknowledgment of the case law holding anecdotal evidence from other employees is "generally" admissible; (2) compounded by imposing a rigid same supervisor/same decisionmaker test.

The district court erroneously applied a "per se" rule from a misreading of *Aramburu v. The Boeing Company*, 112 F.3d 1398 (10th Cir. 1997) — whereas *Aramburu* itself establishes that only "in the context of the discriminatory discipline action" cases is it required that "plaintiffs seeking to present testimony of other employees show they shared the same supervisor." Because the district court "excluded the testimonial evidence based on its erroneous conclusion that *Aramburu* controlled the fate of the evidence in this case," (*Id.*, 15a, n. 4), the panel majority was obligated to correct the error to maintain consistency in a line of Tenth Circuit case law that is not at issue in this Petition. (*Id.*, at 7a-10a).

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Dated: May 11, 2007

Respectfully submitted,

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Attorney for Respondent

APPENDIX

APPENDIX A

DISPLACEMENT GUIDELINES

These guidelines for selecting employees for reduction are listed in descending order of importance.

- Identify all critical positions, or positions that will be unaffected.

- Determine through a workforce analysis the functions or positions to be eliminated and specific individuals to be displaced as a result of these reductions.

- When reviewing same site multiple job incumbents, the intent is to retain the best qualified personnel. Formally consider the following:

  — Assess the background qualifications of each incumbent on the basis of the new position (due to changes in work distribution, position accountabilities may have changed).

  — Review and compare recent performance ratings, attendance, total contribution to the position and the company, and critical skill sets or knowledge.

  — Review any corrective action notices or warnings.

  — Review and compare length of service within the company and within the position.

— Review planned displacement action with the Law Department and Corporate Employee Relations in advance for disparate impact analysis.

NOTE: DOCUMENT AND RETAIN THE INFORMATION USED TO MAKE THE RETENTION DECISION.

Updated September 2001
Corporate Employee Relations

Blessing
Deposition Exhibit
No. 17
Date: 2-19-04

CLERK U.S. DISTRICT COURT
Exhibits:
P 17 D ____
Case No. 03-2429

CONFIDENTIAL SPR-WO10962

APPENDIX B

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS
Fed. R. Evid. 404

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

* * *

(b) **Other Crimes, Wrongs, or Acts.** — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006.)

Supreme Court, U.S.
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No. 06-1221

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Jack B. Weinstein & Margaret A. Berger, 1 *Weinstein's Federal Evidence* § 403.02 (Joseph M. McLaughlin ed., 2006) 8

If a discriminatory employment decision is made, it is made by a supervisor or manager — the decisionmaker — delegated with authority to act on behalf of the employing entity. The *relevant* evidence in a discrimination case therefore is evidence on the thought processes and the biases *vel non* of that decisionmaker. As shown in the petition, this Court's cases properly have focused on evidence of the decisionmaker's motivation. Here, however, the Tenth Circuit majority held it to be reversible error for a district court to exclude allegations of discrimination by persons who had no connection with the plaintiff. In doing so, the Tenth Circuit applied a rule of law that departs from that in at least five other circuits.

I. A Substantial Inter-Circuit Conflict Exists.

Mendelsohn misstates the holdings of the cases she cites. As shown below, other circuits have squarely held that "me, too" evidence is not relevant under Federal Rule of Evidence 401, and/or should be excluded under Rule 403. The Tenth Circuit's decision here conflicts with those other cases.

A. The Tenth Circuit's Decision Is Not Fact-Specific.

Mendelsohn suggests that the Tenth Circuit's decision is fact- and case-specific. She is incorrect.

Several circuits have held that "me, too" evidence *never may be admitted*, as it is irrelevant. The Tenth Circuit now has held, however, that such evidence *never may be excluded*, even under Rule 403. Mendelsohn contends that the Tenth Circuit held that evidence of other employees is admissible only if it is "logically or reasonably tied to the decision to [lay off] Mendelsohn." (Opp. at 2; internal quotations omitted.) In fact, however, the majority opinion's reasoning was circular. The majority held that the "me, too" witnesses are "logically and reasonably tied" to Mendelsohn's circumstances — and that it is reversible error to exclude them — if there is a common scheme or plan affecting others. It then held that a common scheme or plan exists simply because there are "me, too" witnesses.

Thus, this is not a case involving proof of a scheme to discriminate — say, a directive from senior management, or

discussions of managers hatching a plot among themselves.[1] Mendelsohn simply identified five persons (out of 15,000 laid off by Sprint during the telecommunications industry's recession in 2001-02) who wished to contend that they believed that consideration of age tainted their own layoffs. None worked in Mendelsohn's department, and none was laid off by Paul Reddick (the executive who decided to lay off Mendelsohn), by any person reporting to Reddick, or even by Reddick's own boss, Bill Blessing. The only connection between Mendelsohn and the five disputed witnesses was that they all worked for Sprint somewhere at its vast headquarters campus in Kansas City.[2]

---

1. The only company-wide policy cited by Mendelsohn is Sprint's Displacement Guidelines (Opp. at 5-6; Opp. App. 1b-2b), but nothing in them is discriminatory. To the contrary, the guidelines ask supervisors in making layoff decisions to give weight to length of service with Sprint. That if anything gives a leg up to older workers, because length of service normally correlates positively with age. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 603 (3d ed. 1996) ("RIFs by inverse seniority almost always withstand ADEA challenge because they tend to favor older workers."). Mendelsohn's suggestion that one or more Sprint supervisors supposedly made age-based remarks (Opp. at 3 & n.4) or supposedly saw age-related data on RIF worksheets (Opp. at 5) is precisely why the district court had excluded the witnesses who would tell about them: None of the supervisors in question had anything to do with Mendelsohn or the decision to lay her off.

2. Mendelsohn contends, erroneously, that the district court permitted Sprint to produce evidence pertaining to decisionmakers other than Reddick but did not extend the same opportunity to Mendelsohn. (Opp. at 2, 4.) That is incorrect. The district court informed both sides that evidence of decisions pertaining to layoffs by Reddick, or by Reddick's own boss, Blessing, would be admissible. Both sides were free to present statistical and other evidence pertaining to those 75 layoff decisions. The five excluded witnesses were not among the 75; they bore no relationship to Mendelsohn, Reddick or Blessing. Mendelsohn notes that the jury was permitted to hear evidence that Reddick at about the time of the layoff accepted transferring older workers into his unit. (Opp. at 7.) That of course is relevant because it tended to disprove that

(Cont'd)

The rule of law announced by the Tenth Circuit will apply in substantially all discriminatory discharge cases. Most unhappy discharged workers seek to identify other persons who also were discharged and unhappy, and in a large layoff such persons are easy to find. If it was reversible error to exclude the "me, toos" here, it similarly will be reversible error to exclude them in every other case. A clear question of law is presented.

B. The Tenth Circuit's Decision Conflicts With Decisions From At Least Five Other Circuits.

A substantial inter-circuit conflict exists.

- **Second Circuit.**

Contrary to Mendelsohn's assertion, the Second Circuit's treatment of "me, too" evidence cannot be reconciled with that of the Tenth. In *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), the Second Circuit held that the district court erred in permitting "me, too" witnesses to testify about the circumstances of their own terminations. *Id.* at 121. Mendelsohn ignores the court's primary holding: that "me, too" evidence is "insufficient to show a pattern and practice of discrimination" and thus should be excluded as both irrelevant and unfairly prejudicial. *Id.* at 122; *accord Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985) (individuals who "had nothing to do with" the employment decision challenged by plaintiff should not be permitted to testify about the plaintiff's claim).

- **Third Circuit.**

The Third Circuit's approach also differs from that of the Tenth. In *Moorhouse v. Boeing Co.*, 501 F. Supp. 390 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980), the district court excluded the testimony of five employees who, like the plaintiff, alleged that they had been laid off based on age. The court explained, "[T]o the extent testimony of each witness was about his own lay off, it was not relevant to [plaintiff's] lay off." *Id.* at 392. The other Third Circuit decisions Mendelsohn cites

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(Cont'd)

Reddick had embarked on a plan to oust older workers. Mendelsohn's five proffered witnesses, by contrast, had no light to shed on decisions made by Mendelsohn's supervisor, by Reddick, or even by Blessing.

do not contradict *Moorhouse*; in fact, they do not even involve "me, too" evidence.[3] No Third Circuit case is like the Tenth Circuit majority decision here.

- **Fourth Circuit.**

The Fourth Circuit explained that the proper focus is on the plaintiff's personal experience, not the plaintiff's coworkers' experiences. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (dictum). Mendelsohn incorrectly suggests that *Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133 (4th Cir. 2003), is to the contrary, but it is not; there, evidence of prior age discrimination by the same decisionmaker as to plaintiff properly was deemed probative of the plaintiff's claim. *Id.* at 148-49. Nothing in *Kozlowski* suggests that evidence is admissible where (as here) it does not shed light on the plaintiff's decisionmaker's thought processes.

- **Fifth Circuit.**

Mendelsohn characterizes as "ad hoc" the Fifth Circuit's holdings. (Opp. at 24.) In fact, however, the cases she cites all are consistent with *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), summarized in the petition, which held that nonparty testimony is irrelevant unless the witnesses are "similarly situated" to the plaintiff. *Id.* at 302. The court then held that those "who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination" were not "similarly situated" to the plaintiff and could not testify. *Id.*

---

3. *Glass v. Philadelphia Electric Co.*, 34 F.3d 188, 192-93 (3d Cir. 1994) (plaintiff sought to show that *he alone* had been harmed by the allegedly hostile environment in which he had worked; there was no indication that the plaintiff intended to introduce testimony from any other employees); *Becker v. Arco Chemical Co.*, 207 F.3d 176, 184-85 (3d Cir. 2000) (plaintiff was permitted to recount potentially discriminatory statements made by both his supervisor — the decisionmaker as to plaintiff — and others while in the presence of plaintiff's supervisor; there was no issue of "me, too" evidence involving nondecisionmakers; the disputed evidence shed light on the motives of the supervisor-decisionmaker).

Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995), is fully consistent with *Wyvill*. In *Shattuck*, a particular witness could recount the decisionmaker's discriminatory statements; the evidence thus was highly relevant.[4] *Shattuck* has nothing to do with the instant case, because here the Tenth Circuit announced that *all* nonparty testimony is admissible, even when it is untethered to the plaintiff's circumstances and the plaintiff's decisionmaker.

Mendelsohn also cites *Harpring v. Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980). *Harpring*, however, affirmed a district court that had *excluded* proffered evidence of another putative discriminatee. Thus, *Harpring* supports Sprint's position here, not Mendelsohn's. Mendelsohn cites dictum in *Harpring* about the potential role of "me, too" testimony in other cases, but that dictum is limited to pattern-or-practice cases where by definition the treatment of others is relevant. *Id.* at 410. Here, however, Mendelsohn by the time of the Pretrial Conference Order had abandoned any pattern-or-practice contention. Thus, it is *not* true, as Mendelsohn repeatedly contends, that "anecdotal evidence from other employees is generally admissible." (Opp. at 27 (internal quotation omitted); *see also* Opp. at 8, 10, 14.) That only is the rule in class actions. *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (in a class action, individual instances of discrimination bring "the cold numbers convincingly to life"); EMPLOYMENT DISCRIMINATION LAW, *supra* note 1, at 45 (in a class action, "anecdotal evidence of individual instances of discriminatory treatment" supplement the statistical evidence). The instant case is not a class action, and Mendelsohn presented no statistical proof.

The Tenth Circuit's decision here therefore conflicts with those from the Fifth Circuit.

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4. 49 F.3d 1109. The court also held that testimony regarding "a similar statement by a district manager outside [plaintiff's] chain of command" went "afield," but that no prejudicial error had occurred given the record as a whole, because it was "merely cumulative" of other, admissible evidence. *Id.* at 1110.

- **Sixth Circuit.**

Mendelsohn mischaracterizes the Sixth Circuit cases. In *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the court excluded the proffered "me, too" evidence, emphasizing that the plaintiff and nonparty witnesses did not share the same decisionmaker-supervisor. *Id.* at 156. Mendelsohn's witnesses here were not germane to her claims in any respect. Similarly, in *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997), considerations such as whether the plaintiff and witnesses applied for the same position, and whether they did so at the same time, were part of the court's ultimate inquiry as to whether the plaintiff and the proffered "me, too" witnesses had the same decisionmakers. *Id.* at 1130.

The rule in the Sixth Circuit thus differs from that in the Tenth.

- **Seventh Circuit.**

Mendelsohn cannot reconcile the Seventh Circuit's decision in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), with the Tenth Circuit majority's opinion here. *Hunter* does not stand for the proposition that "me, too" evidence is admissible where it bears no relation to the individuals responsible for the plaintiff's alleged harm. The nonparty testimony was relevant in that case because the same supervisors and managers were at issue. *Id.* at 1422.

Similarly, in *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93 (7th Cir. 1985), the court admitted nonparty witness testimony only after the plaintiff introduced evidence that "the Company's President and Chairman [had stated] that the Company wished to eliminate its older employees." *Id.* at 97. *Stumph* therefore involved independent evidence of a common scheme or plan of discrimination. Here, by contrast, the Tenth Circuit held it reversible error to exclude "me, too" evidence *without* any independent evidence linking the nonparty witnesses' testimony to the plaintiff's circumstances.

- **Other circuits.**

Mendelsohn cites decisions from the First and Eighth circuits that arguably can be reconciled with the Tenth Circuit

majority's decision here. Those decisions, however, if anything simply underscore that the conflict in the court of appeals cases is significant and must be resolved.

C. The Tenth Circuit's Own Cases Also Are In Disarray, But Whether They Can Be Reconciled Is Beside The Point.

Mendelsohn devotes a substantial portion of her opposition to an effort to reconcile the Tenth Circuit's majority opinion with prior Tenth Circuit cases. (Opp. at 10-14.) She is incorrect — *Mendelsohn* is impossible to square with prior circuit precedent, as dissenting Judge Tymkovich demonstrated — but whether the Tenth Circuit's own decisions are consistent is of little moment. The full Tenth Circuit has had its chance to rehear the case *en banc*; it voted 7-5 not to do so. Sprint's petition demonstrated that the majority opinion conflicts with decisions from at least five *other* circuits (and pointed dictum from a sixth). That kind of *inter*circuit conflict is the strongest possible reason to exercise *certiorari* jurisdiction, S. Ct. R. 10(a), regardless of whether there is an *intra*circuit conflict.

II. The Rule 403 Issue Is Properly Presented.

Mendelsohn argues that the admissibility of "me, too" evidence under Rule 403 is not a proper subject upon which to grant *certiorari*. (Opp. at 27.) She is incorrect.

A. Rule 403 Findings Are Not Required.

As this Court explained in *Huddleston v. United States*, 485 U.S. 681 (1988), otherwise-admissible evidence is always subject to "general strictures limiting admissibility such as Rule[] . . . 403." *Id.* at 688. *Accord United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984) (Rule 403 is a "generally applicable" rule of evidence). Thus, even "where Rule 403 is not invoked, the trial judge's balancing will be subsumed in his ruling." *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978), *cert. denied*, 439 U.S. 985 (1978). *Accord United States v. Cruz-Garcia*, 344 F.3d 951, 956 n.4 (9th Cir. 2003) ("[A]ll otherwise admissible evidence is nevertheless subject to 403 balancing. Thus, 403 is, in a sense, incorporated into all other rules of evidence."). This Court therefore assumes that the district court

weighed the probative value of the "me, too" evidence against its potential to cause unfair prejudice (and other relevant factors) and concluded that the evidence should be excluded under Rule 403, even though the order did not recite reliance on Rule 403.

It thus is of no consequence that the district court did not engage in an explicit balancing of the Rule 403 factors. Trial courts are not required to make detailed, on-the-record findings under Rule 403 if the balancing factors are evident from the record.[5] Here, the factors militating against the introduction of Mendelsohn's "me, too" evidence are obvious. As the district court noted, Mendelsohn's layoff decisionmaker, Reddick, did not participate in the decisions to lay off any of the five disputed witnesses. The court therefore held that those individuals were not "similarly situated" to Mendelsohn and excluded their testimony accordingly. (Pet. App. 24a.) Inherent in the court's decision was its recognition that Mendelsohn's proffered "me, too" evidence would have distracted the jury from its proper focus — the circumstances of Mendelsohn's own layoff — and delayed the litigation with a series of unfairly prejudicial "mini-trials." Rule 403 exists precisely to prevent such confusing and unfairly prejudicial testimony.[6]

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5. *See Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 885 (8th Cir. 2006) (district court's failure to record its Rule 403 balancing was not an abuse of discretion); *United States v. Pitre*, 960 F.2d 1112, 1126 (2d Cir. 1992) (same); *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926, 931 (1st Cir. 1991) (same); *United States v. Bradshaw*, 935 F.2d 295, 301 (D.C. Cir. 1991) (same); *United States v. Ono*, 918 F.2d 1462, 1465-66 (9th Cir. 1990) (same); Jack B. Weinstein & Margaret A. Berger, 1 *Weinstein's Federal Evidence* § 403.02 (Joseph M. McLaughlin ed., 2006) ("[A] trial court's failure to make explicit findings on the record for a simple decision under Rule 403 does not constitute an abuse of discretion per se.").

6. *See Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1732 (2006) (judges are permitted "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'") (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)) (internal citation omitted; alteration in original).

In addition, the Rule 403 issue is properly presented because the Tenth Circuit itself analyzed the effect of Rule 403 (Pet. App. 29a). The panel's (erroneous) analysis of the issue preserves it for this Court's review, even if this were a case in which the lower court could have held the issue waived.[7]

B. The Court Of Appeals Stripped District Courts Of Discretion To Exclude Evidence Under Rule 403.

Mendelsohn erroneously suggests that the Tenth Circuit held open the possibility of excluding "me, toos" under Fed. R. Evid. 403. (Opp. at 14.) Not so. The court did say that district courts retain authority to exclude "cumulative" evidence (Pet. App. 15a), but it said nothing about the other factors listed in Rule 403: "unfair prejudice, confusion of the issues, . . . misleading the jury, or . . . considerations of undue delay, [or] waste of time." "Cumulative evidence" is only one of multiple considerations under Rule 403, and the Tenth Circuit accorded district courts no latitude to exclude evidence under any of the others.[8]

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7. *See United States v. McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998) (appellate court may conduct a *de novo* balancing under Rule 403 even if the district court failed to do so, and the record contains sufficient evidence of balancing factors); *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994) (if a trial court fails to articulate its balancing under Rule 403, the appellate court may either "'decide the trial court implicitly performed the required balance, [or] undertake to perform the balance [itself]'").

8. Mendelsohn notes that dissenting Judge Tymkovich would have held that the issue was one subject to the trial court's discretion; in his view, it would not have been reversible error to admit or to exclude the evidence. (Opp. at 14, *citing* Pet. 20a.) Mendelsohn accurately quotes the dissenting opinion, but that is a further reason to grant the petition, not a reason to deny it. As shown in the petition, there are three distinct lines of cases. Some hold "me, too" evidence totally irrelevant, and that it is reversible error to admit it. Other cases hold that "me, too" evidence is subject to Rule 403 balancing, with the district judge's discretion rarely disturbed. (Judge Tymkovich's dissenting opinion puts in him this camp.) And a very few courts, like the Tenth Circuit majority here, hold that it is reversible error to exclude "me, too" evidence. The conflict in the court of appeals cases is clear and substantial.

The Tenth Circuit also referenced a trial court's right to issue instructions on the "limitations" of testimony (Pet. App. 13a), but that is inapplicable to the evidence at issue here. This is not a case (and it is hard to conceive of a case) in which "me, too" evidence is offered for a limited purpose; such evidence always is offered on the ultimate question of discrimination *vel non*.

Rule 403 considerations are especially important in reduction-in-force cases like this one. Mendelsohn takes issue with Sprint's use of a ranking system in making RIF decisions (Opp. at 4, 7), but making hard calls — deciding which adequately performing incumbent to release, given the need to cut back — is the essence of a RIF. That is precisely why the Tenth Circuit's decision violated Rule 403. Most any RIF plaintiff can present a plausible argument that he or she could have been retained, and most any RIF plaintiff can find other persons with sympathetic stories who can and desire to say the same thing. Juror sympathy in these circumstances is inevitable, which is why Rule 403 gives district judges the discretion to exclude evidence as unfairly prejudicial. As the Second Circuit put it, in reversing a plaintiff's verdict abetted with "me, too" proof: "Even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) (citation omitted). Here, however, the Tenth Circuit majority departed from *Haskell* and other cases, and held that it was reversible error, even under Rule 403, to exclude the proffered witnesses.

CONCLUSION

The Tenth Circuit's decision conflicts with those from at least five other circuits on a recurring and "controversial" question of law, *see* EMPLOYMENT DISCRIMINATION LAW, *supra* note 1, at 30. This Court should grant *certiorari*.

Respectfully submitted,

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No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corporation move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner Sprint/United Management Company. Consent to the filing of this *amicus* brief was granted by counsel for petitioner but was denied by counsel for respondent.

AT&T Mobility, Honeywell, and Lockheed Martin are three of the nation's leading corporations. AT&T Mobility (formerly Cingular Wireless LLC, and now part of AT&T Inc.) is the largest wireless company in the United States, serving about 61 million customers. Honeywell is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. Lockheed Martin is principally engaged in the research, design, development, manufacture, integration, and sustainment of advanced technology systems, products and services. Its primary customers are agencies of the Government; among other things, Lockheed Martin produces combat aircraft, the Presidential helicopter, weapons systems, spacecraft, and other defense and civil products, and provides a range of logistical, training, and information services.

This case presents issues of great concern to businesses around the country, including *amici*, which are three of the largest employers in the Nation. AT&T Mobility has over 65,000 employees in the United States. Honeywell has about 118,000 employees, of whom approximately 56,000 are in

the United States. Lockheed Martin employs about 140,000 individuals around the world, the majority of whom are located in the United States. All three companies employ thousands of workers in states located within the Tenth Circuit: AT&T Mobility has approximately 3,760 employees in those states; Honeywell has about 3,880; and Lockheed Martin has nearly 11,100. Like most companies, *amici* have instituted human resources policies and practices designed to keep unlawful discrimination out of the workplace.

Nevertheless, *amici*—like most large businesses in this country—face a steady stream of employment discrimination lawsuits. The question presented here is an issue of recurring and substantial importance to *amici* and other employers that must defend against such lawsuits: whether a district court is required to admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff. In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for *amici* and all other employers; as we explain in our accompanying brief, that rule dramatically expands both the scope of liability and the costs of employment discrimination litigation.

Respectfully submitted.

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BRIEF OF AT&T MOBILITY LLC, HONEYWELL INTERNATIONAL INC., AND LOCKHEED MARTIN CORP. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amici AT&T Mobility LLC, Honeywell International Inc., and Lockheed Martin Corporation are three of the nation's leading corporations. AT&T Mobility (formerly Cingular Wireless LLC, and now part of AT&T Inc.) is the largest wireless company in the United States, serving about 61 million customers. Honeywell is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. Lockheed Martin is principally engaged in the research, design, development, manufacture, integration, and sustainment of advanced technology systems, products and services. Its primary customers are agencies of the Government; among other things, Lockheed Martin produces combat aircraft, the Presidential helicopter, weapons systems, spacecraft, and other defense and civil products, and provides a range of logistical, training, and information services.[1]

This case presents issues of great concern to businesses around the country, including *amici*, which are three of the largest employers in the Nation. AT&T Mobility has over 65,000 employees in the United States. Honeywell has about 118,000 employees, of whom approximately 56,000 are in the United States. Lockheed Martin employs about 140,000 individuals around the world, the majority of whom are lo-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

cated in the United States. All three companies employ thousands of workers in states located within the Tenth Circuit: AT&T Mobility has approximately 3,760 employees in those states; Honeywell has about 3,880; and Lockheed Martin has nearly 11,100. Like most companies, *amici* have instituted human resources policies and practices designed to keep unlawful discrimination out of the workplace.

Nevertheless, *amici*—like most large businesses in this country—face a steady stream of employment discrimination lawsuits. The question presented here is an issue of recurring and substantial importance to *amici* and other employers that must defend against such lawsuits: whether a district court is required to admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff. In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for *amici* and all other employers; as we explain, that rule dramatically expands both the scope of liability and the costs of employment discrimination litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. On its surface, this case may appear to be about nothing more than an erroneous application of the rules of evidence. But on a fundamental level, it is about much more: whether, in an individual disparate treatment case, a company's liability may turn on allegations of discrimination made by non-parties.

By creating a *per se* rule that a plaintiff must always be allowed to introduce testimony by non-parties that the employer discriminated against them—even when there is no connection between the employment decision the plaintiff is challenging and the decisions affecting the non-party witnesses—the Tenth Circuit has in effect altered the scope of liability under the federal anti-discrimination laws. Employ-

ers face the risk of being held liable not only (or, indeed, not at all) for their conduct with respect to the plaintiff, but rather for alleged discrimination towards persons not before the court. To guard against this risk, employers will be forced not only to defend the claim being litigated, but also to refute the allegations of all of the non-party employees who have been called to testify about their own allegations of discrimination—and they will have to do so in case after case in which this traveling show of witnesses is called upon to perform.

The decision below also encourages juries to punish employers for conduct directed at non-parties. The prejudice and harm that results from allowing juries to consider conduct that bears no relevance to the plaintiff's own claims implicates due process concerns of the type most recently recognized by this Court in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). As in the punitive damages context, fundamental fairness requires that employers not be subjected to an unreasonable risk of being held liable and/or punished because of conduct directed at non-parties.

In sum, the Tenth Circuit's decision transforms the scope of liability under the anti-discrimination laws—a serious consequence that calls for this Court's intervention.

2. Moreover, the petition demonstrates that there is a well-developed conflict among the circuits on this recurring issue of employment law. Because the existence of this conflict creates incentives for plaintiffs to engage in forum shopping, this Court should grant certiorari now to resolve the conflict.

ARGUMENT

I. REVIEW IS WARRANTED TO ADDRESS THE IMPORTANT QUESTION OF FEDERAL EMPLOYMENT LAW RAISED BY THE DECISION BELOW.

A. The Tenth Circuit's Rule Effectively Requires Employers To Defend Themselves Against Multiple, Unrelated Allegations Of Discrimination In Every Individual Lawsuit.

In practical operation and effect, the Tenth Circuit's decision serves to expand the scope of *substantive* liability under the federal anti-discrimination laws.

1. Under the federal statutes prohibiting discrimination in employment, the focus is—as it should be—on the employment decision affecting the plaintiff herself. Thus, under the ADEA, when "a plaintiff alleges disparate treatment"—as in this case—"'*liability depends on* whether the protected trait * * * actually motivated the employer's decision.' * * * That is, the *plaintiff's* age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)) (emphasis added; brackets in original); *see also* Pet. for Cert. 6–7.

But the Tenth Circuit's decision moves the focus away from the employment decision that the plaintiff is challenging. The Tenth Circuit's rule allows individual plaintiffs—by the mere expedient of alleging a "company-wide policy" of discrimination (Pet. App. 8a)—to evade the requirements of a pattern-and-practice claim and nevertheless introduce the testimony of other employees who "apparently believe[] [that] they too were victims of * * * discrimination." *Id.* at 2a; *see also id.* at 20a (Tymkovich, J., dissenting) ("The larger problem with the majority's position is it suggests that anecdotal

evidence from employees throughout a large organization will be *per se admissible* when offered in the context of alleged discrimination in a [reduction in force].").

Under such a rule, in virtually every employment discrimination lawsuit the company will be put on trial not only for its actions towards the plaintiff herself, but also for how it treated any other employee who testifies that he or she was a victim of discrimination. This wide-angle lens captures both employees who worked within the same supervisory chain as the plaintiff—and whose testimony may be relevant (*see* Pet. for Cert. 7–8)—and employees who worked for different supervisors in different departments (indeed, perhaps in different cities or states)—whose testimony would have no bearing on the decision concerning the plaintiff.

Because this rule mandates admission of any non-party claim of discrimination as a matter of law, it distorts the substantive grounds on which a company may be held liable for violating the ADEA and other anti-discrimination laws. No longer would a plaintiff's claim stand or fall on its own merits. Rather, the fates of the plaintiff's claim and the employer's defense would each be inextricably linked to other employees' separate claims. Testimony by such witnesses bears no logical connection to whether unlawful discrimination motivated the adverse employment decision about the plaintiff. Nevertheless, such allegations have the power to inflame a jury's passions while distracting the jury from the task properly before it.

Moreover, the Tenth Circuit's rule may force an employer to square off not against the plaintiff herself, but rather against a "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be," because plaintiffs are able to "strike [defendant] with selective allegations, which may or may not have been available to individual named plaintiffs." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.) (recognizing procedural unfair-

ness of having to defend against a class action involving "fictional composite" plaintiff).[2] These concerns are even greater in the context of an individual lawsuit that—as here—does not allege a "pattern and practice" of discrimination. As the Seventh Circuit recently explained in a similar setting, the use of "statistical evidence" showing that most of the workers laid off in a reduction in force were over the age of 40 is immaterial to a plaintiff's claim that he had been discriminated against in the absence of evidence that the other employees were "similarly situated" and shared a "common supervisor." *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490–92 (7th Cir. 2007) (citation and internal quotation marks omitted); *see also id.* at 492 (noting that "[s]tatistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods."). The decision below invites the same type of logically unconnected comparisons, by allowing an individual plaintiff to bolster his case with facts from other incidents involving other decisionmakers.

Furthermore, by force of numbers, the employer is placed at a distinct—and perhaps insuperable—disadvantage. The plaintiff's own case, no matter how weak, will be strengthened significantly by the vivid, passionate allegations of discrimination recited by other employees of the company. That will be the case regardless of the merits of the non-

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[2] Describing concerns similar to those expressed in *Broussard*, Judge Posner has explained: "In effect the appeal asks us to graft [one named plaintiff's] timely filing with the EEOC onto [another named plaintiff's] untimely but not-yet-shown-to-be-unmeritorious discrimination case to create a composite plaintiff to represent the class of blacks denied employment by the defendant. We cannot find any basis in law or good sense for such ghastly surgery. Neither plaintiff is a suitable class representative, and zero plus zero is zero." *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999).

parties' allegations. Despite the lack of connection to the plaintiff's own claims, the steady drumbeat of allegations of discrimination will have the foreseeable effect of reinforcing the plaintiff's claim, thereby unduly prejudicing the employer. Thus, as one district judge explained in a frequently cited opinion, even the "strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980) (table).

2. The practical consequence of the Tenth Circuit's rule is to make employment litigation more protracted and expensive. A company will be forced to refute the allegations of every non-party witness who claims to be the victim of discrimination. As one practitioner has explained, "if such ["me, too"] testimony is admitted, the defendant would have the Hobson's choice of defending each situation or leaving the testimony unrebutted, either of which is prejudicial." Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 829 (1999). In short, every such witness will trigger a trial-within-a-trial.

Indeed, even a small contingent of former employees who claim discrimination would take on outsized importance at trial.[3] To place these complaining witnesses in their proper context vis-à-vis the entire workforce, an employer would need to offer its own witnesses to testify about the decision-

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[3] The facts in this case are illustrative. The plaintiff hand-picked five witnesses who were prepared to testify that they were discriminated against by other decisionmakers at Sprint. These individuals were among the approximately "15,000 employees [who] were released" by Sprint as part of the reduction in force over an 18-month period. Pet. for Cert. 2. In other words, these five witnesses represented a minuscule percentage of those who were laid off.

making process for each and every witness, as well as for the many employees affected by the job action who have not claimed to have been victimized by discrimination. And it might also need to introduce evidence about the individuals within the protected class who were not affected by the job action. Conceivably, a company could—and perhaps should—offer such testimony from dozens of its current and former employees. Even that might not suffice to counter the indelible impression created by a handful of non-party witnesses who accuse the company of discriminating against them.

Moreover, such extensive trial proceedings will not come cheaply, imposing substantial and unwarranted litigation costs on companies regardless of the merits of the plaintiff's *own* claims.[4]

B. By Inviting Juries To Base Liability For Discrimination On Acts Allegedly Directed Against Non-Parties, The Tenth Circuit's Rule Is Fundamentally Unfair.

The Tenth Circuit's rule also is troublesome because it invites juries to impose liability for alleged harms to parties not before the district court—thereby threatening companies' right to a fair trial. This Court identified similar concerns earlier this Term in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), explaining that "fundamental due process concerns" are raised when a jury "use[s] a punitive damages verdict to punish a defendant directly on account of harms it is

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[4] The costs associated with employment litigation are already substantial. "[O]nce a case is in court, it's expensive. A company can easily spend $100,000 to get a meritless lawsuit tossed out before trial. And if a case goes to a jury, the fees skyrocket to $300,000, and often much higher. The result: Many companies today are gripped by a fear of firing." Michael Orey, *Fear of Firing: How the threat of litigation is making companies skittish about axing problem workers*, BUS. WEEK (Apr. 23, 2007), at 54.

alleged to have visited on nonparties." *Id.* at 1063, 1064. In particular, the Court noted three concerns in the context of the jury's punitive damages award: the "risks of arbitrariness, uncertainty and lack of notice." *Id.* at 1063. Here, those concerns are, if anything, heightened because the plaintiff seeks to prove her *own* cause of action by reference to alleged acts directed at others. Although petitioner does not frame the issue in Due Process terms, it nonetheless remains "important for a court to provide assurance that the jury will ask the right question, not a wrong one." *Id.* at 1064. Yet the rule announced below virtually ensures that juries will ask—and answer—the wrong question. Rather than focusing on the merits of the specific allegations of the plaintiff at hand, juries are invited to base their finding of liability and "punish [a defendant] for harm caused [to] strangers [to the litigation]." *Id.*

This Court did hold in *Williams* that, in the context of assessing punitive damages, evidence of harm to others arising from the same conduct "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* But evidence of *different* conduct aimed at nonparties has no role to play in setting punitive damages (*see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003)), much less in determining liability in an individual disparate treatment case. In an individual employment lawsuit, the plaintiff does not—and cannot—claim that the employer's decision was part of a single course of conduct that "posed a substantial risk of harm to the general public" (*Williams*, 127 S. Ct. at 1064). Rather, the plaintiff's claim relates only to herself; her purpose in offering evidence of distinct conduct directed at others is to lighten the burden of persuading the jury that there was discrimination against her. Therefore, any jury that considered this evidence would be doing precisely what *Williams* forbids: "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

By insisting that other employees' allegations of discrimination be placed front and center before juries—no matter how attenuated the link to the plaintiff—the Tenth Circuit mandated a "procedure[] that create[s] an unreasonable and unnecessary risk of [jury] confusion occurring." *Id.* at 1065. For the reasons we have explained (*see* Part I(A), *supra*), that risk is both very real and wholly unnecessary.

II. THE QUESTION PRESENTED WARRANTS REVIEW SOONER RATHER THAN LATER.

As the petition details, the decision below conflicts with the decisions of at least five other circuits. *See also* EEAC/SHRM Proposed Amici Br. at 5–9 (delineating circuit split). The present case is an ideal vehicle with which to resolve the split, and there is nothing to be gained by allowing the disagreement among the courts of appeals to fester further.

To the contrary, so long as this division is allowed to persist, it will have the predictable effect of encouraging employment discrimination plaintiffs to engage in forum shopping. As this Court has explained, the problem of forum shopping "is a very old one affecting the administration of the courts as well as the rights of litigants"; "when litigation is piled up in congested centers instead of being handled at its origin," courts face "[a]dministrative difficulties." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) (discussing doctrine of *forum non conveniens*, now superseded in part by statute).

Those dangers are likely to be realized if review is not granted here. Under the general venue statute (28 U.S.C. § 1391)—which applies both to the ADEA and 42 U.S.C. § 1981—venue is technically proper with respect to corporate defendants "in any judicial district in which [the corporation] is subject to personal jurisdiction. 28 U.S.C. § 1391(c). And even under the more restrictive special venue provision applicable under Title VII and the Americans with Disabilities

Act ("ADA"), venue may properly lie "in the judicial district in which the [relevant] employment records * * * are maintained and administered[.]" 42 U.S.C. § 2000e-5(f)(3) (Title VII); *see also* 42 U.S.C. § 12117(a) (provision of ADA incorporating Title VII's venue provision).

Hence, for most corporations—including *amici*—with business operations or headquarters in Colorado, Kansas, Oklahoma, New Mexico, Utah, or Wyoming, venue will likely be technically proper in judicial districts within the Tenth Circuit. As a consequence, plaintiffs surely will try to take advantage of the decision below by filing lawsuits in federal district courts within the Tenth Circuit, regardless of where the challenged action took place. And in cases in which the employment decision occurred outside the Tenth Circuit, employers will predictably—and properly—respond by moving to transfer venue pursuant to 28 U.S.C. § 1404. All of this adds up to needless work for district courts within the Tenth Circuit. By granting review and resolving the circuit split, this Court can reduce the amount of forum shopping and associated motions practice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a district court in a disparate treatment case must admit "me, too" evidence — testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

PARTIES TO THE PROCEEDING

Ellen Mendelsohn, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Sprint/United Management Company, now a subsidiary of Sprint Nextel Corporation.

STATEMENT PURSUANT TO RULE 29.6

Sprint/United Management Company is a wholly owned subsidiary of Sprint Nextel Corporation, which issues shares to the public. (The employer for simplicity will be referred to herein as "Sprint.")

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OPINIONS AND ORDERS BELOW

The Tenth Circuit's decision is officially reported, *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006), and is reproduced in the appendix to Sprint's petition for a writ of *certiorari* ("Pet. App.") at 1a-23a. The court of appeals' order denying Sprint's rehearing petition is reproduced at Pet. App. 25a-26a. The district court's minute order, granting Sprint's motion *in limine* on the issue presented by this appeal, is reproduced at Pet. App. 24a. The district court's additional remarks on the issue, elaborating on and modifying the *in limine* ruling as the trial progressed, are reproduced in the Joint Appendix ("J.A.") at 279a-297a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The United States Court of Appeals for the Tenth Circuit issued its opinion on November 1, 2006. Sprint timely petitioned for rehearing and rehearing *en banc* on November 15, 2006. The court denied that petition on January 16, 2007. This Court granted *certiorari* on June 11, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 624-634. The relevant provisions of the Act are reproduced at Pet. App. 27a-28a. Federal Rules of Evidence 401, 402, and 403 are reproduced at Pet. App. 29a.

STATEMENT OF THE CASE

Respondent Ellen Mendelsohn worked for Sprint from 1989 until November 2002, most recently in the Mobile Financial Services unit within Sprint's Business Development Strategy group. J.A. 9a. She was laid off in a reduction-in-force, as the Business Development Strategy group downsized from 75 to 57 persons. J.A. 340a. Mendelsohn's immediate supervisor, Jim Fee, had rated her as the weakest performer in Mobile Financial Services. J.A. 318a-319a. Fee's manager, Sprint Assistant Vice President Paul Reddick, decided to include Mendelsohn in the layoff. J.A. 339a-340a.

Other Sprint units over a period of months and years also downsized, as Sprint sought to cope with the telecommunications industry's recession. Over a period of about 14 months, about 15,000 employees were released, and Mendelsohn never disputed that the layoffs as a whole were grounded in "real" business necessity. *See* J.A. 317a-318a; *Sprint Will Cut Another 2,100 Jobs*, N.Y. TIMES, Dec. 12, 2002, at C3. Decisions about specific affected individuals were made by the supervisors and managers responsible for each downsizing department or other business unit. J.A. 310a-312a, 337a-341a.

Mendelsohn was 51 when she was laid off. J.A. 129a. She filed an administrative charge with the Equal Employment Opportunity Commission in April 2003, alleging age discrimination. J.A. 9a. The EEOC dismissed the charge because it concluded that the evidence failed to establish a violation of law. J.A. 14a.

In August 2003, Mendelsohn sued under the ADEA in the U.S. District Court for the District of Kansas, alleging disparate treatment based on age. J.A. 14a. She first asserted, but then abandoned, a contention of a pattern or practice of age discrimination affecting others. *Compare* J.A. 7a-14a (Complaint) *with* J.A. 127a-154a (Pretrial Order). *See* D. Kan. Rule 16.2(c) ("The pretrial order . . . will control the subsequent course of the action unless modified . . . by an order of the court to prevent manifest injustice.")

Before trial, Sprint moved *in limine* to exclude testimony from five witnesses. J.A. 155a-161a. The five were former Sprint employees who would claim that they themselves had been released based on age, in layoffs conducted in other departments by other managers. (Such persons have been described as "me, too" witnesses, *e.g.*, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 72-73 (4th ed. 2007).) Specifically, Bonnie Hoopes, Yvonne Wood, and Sharon Miller sought to testify that they had heard ageist remarks by one or more Sprint supervisors or managers. J.A. 343a-346a. Wood also sought to testify that she had seen a spreadsheet suggesting that age was one of the criteria that another supervisor, Dan Kennedy, may have considered in making his own layoff decisions. J.A. 344a-345a. A fourth proffered witness, John Borel, sought to testify that he had been given a false negative evaluation by his direct supervisor, Janet Mathis, at the behest of her own supervisor, Mohammad Hussain. J.A. 346a-347a. Borel also sought to testify that another manager, Jay Cole, had informed Borel that Borel had been banned from working at Sprint, and that Borel had witnessed another employee, Carol Kippes, harassed because of her age. J.A. 347a-348a. The fifth proffered witness, John Hoopes, sought to testify that he had

been replaced by a younger employee, and that his post-reduction-in-force job applications to Sprint had been rejected. J.A. 348a-349a.

None of the proposed testimony concerned Mendelsohn or the Business Development Strategy group. None of the five witnesses worked in that group. None of the five had worked under (i) Mendelsohn's direct supervisor, Fee (who had rated her as the weakest employee in his unit); (ii) Reddick (the Assistant Vice President who was Fee's manager, and who made Mendelsohn's layoff decision); or (iii) Sprint Vice President Bill Blessing (who was Reddick's boss, and who ran the entire Business Development Strategy group). None of the five witnesses alleged hearing ageist remarks by Fee, Reddick or Blessing. And none of the five had anything else relevant to say about plaintiff Mendelsohn. Specifically:

- **Bonnie Hoopes:** She was laid off at about the same time as Mendelsohn, but she did not work in Reddick's or Blessing's chain of command, and Mendelsohn did not contend that Reddick or Blessing played a role in Ms. Hoopes' layoff. Ms. Hoopes admitted that she never even had worked with Reddick. J.A. 353a-354a.

- **Wood:** She was laid off two months after Mendelsohn. Wood, like Ms. Hoopes, did not work in Reddick's or Blessing's chain of command, and neither Reddick nor Blessing played a role in Wood's layoff. Wood admitted that she never had spoken with Mendelsohn and that she had no information about Mendelsohn's employment with or separation from Sprint. J.A. 354a-355a.

- **Miller:** She was laid off at about the same time as Mendelsohn, but — like the others — Miller did not work in Reddick's or Blessing's chain of command, and neither Reddick nor Blessing played a role in her layoff. Miller never had spoken with Mendelsohn and, like Wood, she had no information about Mendelsohn's separation from Sprint. J.A. 355a-356a.

- **Borel:** He was laid off approximately four months after Mendelsohn's separation. Borel worked outside the chain of command of Reddick and Blessing, and Mendelsohn did not contend that Reddick or Blessing played a role in Borel's layoff. He admitted that he did not know Mendelsohn, and that he had no information about Mendelsohn's employment or layoff. J.A. 356a-357a.

- **John Hoopes:** He was laid off over nine months before Mendelsohn. Mr. Hoopes, like the rest, worked outside Reddick's and Blessing's chain of command, and neither Reddick nor Blessing played a role in Mr. Hoopes' layoff. He, too, admitted that he had no information about Mendelsohn's employment with or separation from Sprint. J.A. 357a.

Sprint therefore contended that none of the five witnesses could shed light on Reddick's motives in selecting Mendelsohn for layoff.

The district court (Vratil, J.) granted Sprint's motion *in limine* in part, holding that only persons "similarly situated" to Mendelsohn would be allowed to testify about their personal circumstances. Specifically, the district court ruled that former employees who were laid off by Mendelsohn's ultimate supervisor, Reddick, in close temporal proximity to Mendelsohn's own layoff, were similarly situated to Mendelsohn and could testify about their own claims and circumstances. Pet. App. 24a. As the trial proceeded, the district court gave Mendelsohn more latitude even than that. The court expanded its ruling to permit Mendelsohn also to introduce evidence relating to decisions made by (or under) Blessing, Reddick's boss. J.A. 279a-297a. According to the court, this information was relevant to the issue of whether the RIF — as administered by Reddick and Blessing — was a pretext for age discrimination. J.A. 295a-296a. In admitting the evidence to this extent, the district court considered both relevance and the risk of jury confusion. The court found that, provided the scope of proof was limited to Reddick and Blessing, there was no substantial risk of confusion:

> I believe it's clear to the jury now, [or] if it's not clear now, it certainly will be clear at the end of the case, that they're only called upon to evaluate whether Sprint discriminated against this plaintiff and plaintiff will only be allowed to argue [based on] how other employees . . . who were similarly situated[,] subject[] to the same decision-maker and the same RIF.

J.A. 287a. Because the five former employees Mendelsohn identified did not fall within Reddick and Blessing's chain of command, the district court excluded their testimony. J.A. 295a-297a.

Following an eight-day trial, the jury returned a verdict for Sprint, finding that Sprint did not discriminate against Mendelsohn based on age. J.A. 406a.

Mendelsohn appealed. A panel of the Tenth Circuit (per Baldock, J.) reversed in a 2-1 decision. The majority held that the testimony from the five ex-employees was relevant, even though none of the five witnesses reported to or was laid off by Reddick or Blessing, and even though none worked in the Business Development Strategy group with Mendelsohn. Pet. App. 9a-10a. The majority acknowledged that such "me, too" evidence would be inadmissible in a case alleging discriminatory *discipline*. Pet. App. 7a-8a. In the context of a *reduction-in-force*, however, the majority held that "me, too" evidence must be admitted if there is "independent evidence" of a company-wide policy of discrimination, and that the "me, too" evidence without more comprises that "independent evidence." Pet. App. 10a-11a. The panel majority also held that the district judge lacked the discretion, even under Federal Rule of Evidence 403, to exclude the evidence. Pet App. 15a-16a.

Judge Tymkovich dissented. He contended that evidence concerning decisions made by persons other than the decisionmaking supervisor should be excluded except where there is "independent evidence of specific enterprise-wide policy." Pet. App. 22a. The evidence here did not establish that Reddick or Blessing harbored discriminatory animus toward Mendelsohn, or that the RIF was a pretext for a company-wide discriminatory policy. Thus, the dissent argued, the majority created an erroneous rule of law that "even the most tangentially relevant and prejudicial testimony by former employees is per se admissible." Pet. App. 23a.

Sprint petitioned for rehearing. The panel (again 2-1) denied rehearing, and the full court voted 7-5 to deny rehearing en banc. Pet. App. 25a-26a.

This Court granted *certiorari*. 127 S. Ct. 2937 (2007).

SUMMARY OF ARGUMENT

A discriminatory employment decision is made by the supervisor or manager — the decisionmaker — exercising delegated authority to act for the employing entity. This Court's employment discrimination cases have found liability, or at least a triable question of it, where the plaintiff has presented substantial evidence of discriminatory intent by a decisionmaker. By contrast, where the decisionmaker is not shown to be biased, no discrimination liability exists. The Court's approach has been the same in analyzing discrimination contentions in diverse contexts, unrelated to employment: A violation depends on the presence or absence of proof (i) of discriminatory intent, (ii) by a decisionmaker.

Here, Reddick in Sprint's Business Development Strategy group made the decision to lay off Mendelsohn. Mendelsohn sought to prove her claim of age discrimination by calling five nonparty witnesses. Each of the five would have testified that he or she believed that he or she was selected for layoff from Sprint based on age. But neither Reddick nor his boss Blessing supervised (directly or indirectly) any of the five witnesses, and Reddick and Blessing had nothing to do with the layoff decisions of any of the five. None of the five witnesses had anything to say about the motivations of Reddick or Blessing, only those of decisionmakers in a handful of *other* Sprint departments. Yet the court of appeals majority held that it was reversible error

to exclude from evidence these discrimination allegations, (i) *by* persons who had no connection with Mendelsohn, (ii) *against* persons who had no connection with Mendelsohn.

The court of appeals majority was incorrect. The evidence was properly excluded, and indeed it would have been reversible error to admit it. Evidence is not probative in a disparate-treatment case unless nexus to the decisionmaker is proven. The better-reasoned court of appeals cases thus exclude from evidence, as irrelevant under Federal Rules of Evidence 401 and 402, the so-called "me, too" evidence at issue here: claims of discrimination by witnesses who would assail the motivations of persons other than the plaintiff's decisionmaker(s). This Court similarly should hold that such evidence is substantively irrelevant. In concluding otherwise, the court of appeals majority engaged in circular reasoning. The majority held that "me, too" evidence becomes admissible if there is a common scheme or plan to discriminate — and a common scheme or plan exists if there are "me, too" witnesses.

The lack of relevance should end the matter, but Federal Rule of Evidence 403 provides an additional ground for reversing the court of appeals. The disputed evidence would have caused undue delay and wasted trial time because admitting the evidence would have led to trials-within-a-trial of the circumstances of the five nonparty witnesses. The evidence also would have created the risk of confusion of the issues or misleading the jury, because it would have distracted the jury from the merits (or lack thereof) of Mendelsohn's own claim. Finally, the evidence would have caused unfair prejudice. Jury trials arising out of economically driven reductions-in-force by their nature present sensitive issues. The essence of a RIF is that an

adequately performing incumbent is released when the employer makes a judgment that it needs to cut back. "Me, too" evidence in a case such as this is unfairly prejudicial. As one often-cited lower court decision put it, "even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age."

For each of these reasons the district court correctly excluded the five disputed witnesses. The court of appeals held otherwise, but this Court should reverse.

ARGUMENT

I. THE DISPUTED EVIDENCE WAS PROPERLY EXCLUDED AS SUBSTANTIVELY IRRELEVANT UNDER FEDERAL RULE OF EVIDENCE 401

The ADEA makes it unlawful "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). This Court's cases illuminate how "because" is proven.

If a discriminatory employment decision is made, it is made by a supervisor or manager — the decisionmaker — delegated with authority to act on behalf of the employing entity. In an employment discrimination case "the defendant is ordinarily not an individual but a company," *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 520 (1993) (emphasis omitted), which hires supervisors and managers "and then delegates to [them] the task of [maintaining] a competent work force," *Furnco Construction Co. v. Waters*, 438 U.S. 567, 569-70 (1978). *Relevant* evidence therefore sheds light on the thought processes and possible biases of the

decisionmaker. Here, however, the court of appeals majority held it to be reversible error for a district court to exclude from evidence discrimination allegations (i) by persons who had no connection with the plaintiff, (ii) against persons who had no connection with the plaintiff. Because the disputed evidence was irrelevant, the district court properly excluded it, as shown below.

A. This Court's Cases Teach That Discrimination Proof Focuses On The Biases Of The Decisionmaker.

The Court has articulated for decades a tripartite allocation of discrimination proof in cases like this one, alleging disparate treatment. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), summarized the law as follows:

> In . . . "disparate treatment" cases, which involve "the most easily understood type of discrimination," *Teamsters v. United States*, 431 U.S. 324, 335, n.15, 97 S. Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S., at 255, n.8, 101 S. Ct., at 1094, n.8.

Id. at 986.

The Court summarized the tripartite allocation:

> The burden of proving a prima facie case is "not onerous," *id.*, at 253, 101 S. Ct., at 1094, and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. *Id.*, at 254-255, 101 S. Ct., at 1094. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination. *Id.*, at 253, 255, n.10, 101 S. Ct., 1093, 1094, n.10.

Id. The proof burden at all times rests with the plaintiff:

> [T]hese shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253, 101 S. Ct., at 1093. See also *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983).

Id.[1]

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1. This Court has "never had occasion to decide whether . . . application of the Title VII rule to the ADEA context is correct," *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), but it assumed that to be so in that case. The Court similarly may do so here, as Sprint can assume that Mendelsohn had a prima facie case. The case therefore turns on proof of the ultimate question of pretext.

This case requires the Court to elaborate on how the last element — pretext for discrimination — is proven. This Court's prior cases reveal the proper approach.

1. This Court's employment cases turn on whether discriminatory intent by a decisionmaker is shown.

A discrimination trial by its nature tests the decisionmaker's state of mind in acting on the employer's behalf. *St. Mary's Honor Ctr.*, 509 U.S. at 520 ("[I]n these [discrimination] cases, the defendant . . . must rely upon the statement of an employee — often a relatively low-level employee — as to the central fact[,] and that central fact is not a physical occurrence, but rather that employee's state of mind.") (emphasis omitted). This Court's cases properly focus on the decisionmaker, rather than on attitudes of or remarks by other persons who played no role in the employment dispute at issue.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for example, the Court held that the plaintiff had raised a triable question of age discrimination in his discharge. It was undisputed that a particular supervisor, one Chesnut, "was the actual decisionmaker." *Id.* at 152. A triable question arose from "evidence that Chesnut was motivated by age-based animus," including his statement that the plaintiff "was so old [he] must have come over on the Mayflower," and that the plaintiff "was too damn old to do [his] job." *Id.* at 151.

Similarly, in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam), another discharge case, the Court reversed summary judgment, citing potentially discriminatory

remarks by the decisionmaker. In *United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.2 (1983), a case alleging race discrimination in promotions, the Court noted that plaintiff had "introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular." In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute in part on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), the Court set forth at length the evidence of discrimination in that case. It "did not simply consist of stray remarks," but rather discriminatory comments from the defendant's partners upon whom the defendant's Policy Board had relied in denying her partnership. *Id.* at 251, 256 & n.15.

Other cases are to similar effect: substantial evidence of discrimination by a decisionmaker leads to liability, or at least a triable question of it. *E.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95-96 (2003) (affirming liability for gender discrimination under a mixed-motive theory; the decisionmakers, plaintiff's supervisors, earlier had stalked plaintiff and "'frequently used or tolerated' sex-based slurs against her"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993) (remanding for the court of appeals to consider whether the proffered evidence of discriminatory intent, including "comments by the Hazen[] [cousins]" who ran the firm and decided to discharge plaintiff, raised a triable question of disparate treatment based on age).

By contrast, where the decisionmaker is *not* shown to be biased, no discrimination liability exists. In *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), for example, plaintiff Hernandez sued for disability discrimination when Hughes Missile Systems refused to rehire him. Hernandez earlier had

worked for Hughes, but he had resigned in lieu of discharge after testing positive for cocaine in a lawful drug test. Hernandez's personnel file did not record the results of the drug test, only that he was discharged for unspecified workplace misconduct.

More than two years elapsed. Hernandez then reapplied to work at Hughes. A human resources department employee, Joanne Bockmiller, reviewed his file and rejected his application, citing Hughes' "policy against rehiring employees who were terminated for workplace misconduct." *Id.* at 47. She testified without contradiction that she did not know that the misconduct in Hernandez's case was drug-related. *Id.*

Hernandez sued, alleging disparate treatment based on the disability of drug addiction. The Court of Appeals for the Ninth Circuit found a triable question of disparate treatment, but this Court unanimously vacated the judgment of the court of appeals. "The Court of Appeals did not explain . . . how it could be said that [the decisionmaker,] Bockmiller[,] was motivated to reject respondent's application because of his disability if Bockmiller was entirely unaware that such a disability existed," the Court noted. *Id.* at 54 n.7. "If Bockmiller were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability," no matter what other persons at Hughes might have known. *Id.*; *accord Clark County School District v. Breeden*, 532 U.S. 268, 272, 273 (2001) (per curiam) (no inference of retaliation could possibly be drawn because the decisionmaker had "not become aware of the lawsuit [and right-to-sue letter that preceded it, before] . . . she proposed" the adverse action at issue); *see also Price Waterhouse*, 490

U.S. at 277 (O'Connor, J., concurring) (discriminatory remarks by someone are not probative if they are "unrelated to the decisional process itself"). Discriminatory remarks or decisions by others of course are unfortunate — any enlightened employer conducts training to eradicate them — but they have no probative significance in a claim of disparate treatment by a plaintiff, alleging discrimination at the hands of someone else.

Proper analysis of a discrimination case therefore focuses at the threshold on (i) what the adverse employment decision is, and (ii) who made it, on the employer's behalf. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), for example, the Court focused on the identity of the decisionmakers: there, the senior faculty who effectively denied tenure to Rosalie Tung, a junior professor at the Wharton School. The narrow question presented was one of discovery — were academic peer-review materials privileged, or discoverable? — but in answering that question the Court necessarily assessed relevance. There relevance was obvious; EEOC sought to obtain "(1) confidential letters written by Tung's evaluators; (2) the department chairman's letter of evaluation; [and] (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure . . . ." *Id.* at 186. Those materials, which focused on Professor Tung's tenure decisionmakers, plainly were relevant; "Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files" containing comments of the persons who effectively controlled the tenure decision. *Id.* at 193; *cf. Delaware State College v. Ricks*, 449 U.S. 250, 257 n.8, 262 n.16 (1980) (noting that a

physical altercation between plaintiff Ricks and his department chair, McLaughlin, could be evidence shedding light on the chairman's intent in denying Ricks academic tenure; "university boards of trustees customarily rely on the professional expertise of the tenured faculty" in making tenure decisions); *NLRB v. Yeshiva University*, 444 U.S. 672, 677 n.5, 686 & n.23 (1980) (university faculty members cannot collectively bargain because they are supervisorial and managerial employees; they are the decisionmakers for the university in matters of hiring, tenure, termination and curriculum).

Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984), recognized that one employee's discrimination proof differs from that of others, even among employees of the same overall entity. In *Cooper*, the EEOC and certain employees of the Richmond Federal Reserve brought a race class action. The district court certified a class but then, on the merits, found no pattern or practice of discrimination. Several individuals later brought their own individual cases. The Federal Reserve contended that *res judicata* barred their claims. This Court disagreed. The failure of a class action against an employer does not mean that there are not valid individual cases to be brought, the Court explained. *Id.* at 878. In *Cooper*, the proof presented by some of the individual plaintiffs — the evidence pertaining to the decisionmakers' biases *vel non* — was sufficiently dissimilar to that at issue in the failed class action, to permit those individuals' cases to be heard on their own particular merits. As this Court put it, "a piece of fruit may well be bruised without being rotten to the core." *Id.* at 880.

Just last Term, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Court unanimously reiterated that the focus of discrimination proof is on the decisionmaker. In *Ledbetter*, the Court considered whether the statute of limitations barred a gender pay-discrimination claim. The Court was closely divided on that issue, but there was no disagreement on the principles of proof that would have governed any trial of plaintiff's claim. "Ledbetter asserted disparate treatment, the central element of which is discriminatory intent," the majority noted. *Id.* at 2167. The issue therefore was whether one or more particular supervisors — "the relevant Goodyear decisionmakers," *id.* — had intentionally discriminated in setting plaintiff's pay. Justice Alito's majority opinion found the claim barred, holding that the allegedly discriminatory pay decisions were made when they were made, *id.* at 2169, and that plaintiff needed to show discriminatory intent by the decisionmaker. Proof of discrimination for dated decisions can be difficult, because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened" to the plaintiff at the hands of the decisionmaker(s). *Id.* at 2171. In that case, for example, "Ledbetter's claims . . . turned principally on the misconduct of a single Goodyear supervisor, who . . . by the time of trial . . . had died and therefore could not testify." *Id.* at 2171 n.4. But it was that person's intent that was at issue. A plaintiff may not "rel[y] on the intent associated with other decisions made by other persons at other times," the majority cautioned. *Id.* at 2169.

The dissenting justices would have held differently on the existence of the time bar, because they would have treated "each payment of a wage or salary infected by sex-based discrimination [as a new] unlawful employment practice."

Id. at 2179 (Ginsburg, J., dissenting). The dissenters did not disagree, however, on how discrimination is proven on the merits. "Title VII requires a showing of intent," the dissenters acknowledged, and as a result "Ledbetter carried the burden of persuading the jury that the pay disparity she suffered was attributable to intentional sex discrimination" by the person who set her pay. *Id.* at 2187 (citing specific evidence of discrimination on the part of two of Ledbetter's former supervisors-decisionmakers).

Thus, while the *Ledbetter* Court was divided on the proper application of the statute of limitations, the entire Court agreed on the core substantive principle of disparate treatment proof: (i) discriminatory intent, (ii) by a decisionmaker.

2. In a host of other contexts this Court similarly has evaluated discrimination contentions by focusing on the motivation of the decisionmaker.

Discrimination contentions also arise outside the employment context. This Court's analytical approach has been the same: evaluating whether bias by the decisionmaker is shown. This is true in cases involving alleged discrimination in zoning,[2] discrimination in criminal

2. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194, 196-97 (2003) (the court of appeals erred in "ascribing the [discriminatory] motivations of a handful of citizens . . . to the City [officials]" who ultimately decided to call a referendum on a zoning issue; the discrimination plaintiffs needed to produce evidence of discriminatory "statements made by *decisionmakers or referendum sponsors* during deliberation over [the referendum].") (emphasis added); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 267 (1977) (where "discriminatory intent or purpose" is at issue, relevant evidence is that which "shed[s] some light on the decisionmaker's purposes").

prosecution,[3] discrimination in political appointments,[4] discrimination in jury selection,[5] and discrimination

3. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 126 S. Ct. 1695, 1706 (2006) (relevant inquiry in selective prosecution cases is whether an "unconstitutionally motivated inducement infected the [particular] prosecutor's decision to bring the charge"). *Compare Wright v. Georgia*, 373 U.S. 284, 292 (1963) (petitioners' arrest for breach of the peace violated the Equal Protection Clause because "[i]t was obviously based, *according to the testimony of the arresting officers themselves*, upon their intention to enforce racial discrimination") (emphasis added) *with Chaffin v. Stynchcombe*, 412 U.S. 17, 26-27 (1973) (refusing to impute a retaliatory motive to a criminal defendant's new judge and jury following the vacatur of his initial conviction; the danger of vindictive sentencing is "*de minimis*" where "the second sentence is not meted out by same judicial authority [that] handl[ed] the prior trial").

4. *Mayor of Philadelphia v. Educ. Equality League*, 415 U.S. 605, 619, 621 (1974) (rejecting the argument that the alleged bias of "a city official who did not have final authority over or responsibility for the challenged appointments" could be "imputed" to the official holding the appointment power).

5. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 95, 96 (1986) (focusing on the particular prosecutor's use of peremptory challenges in evaluating an allegation of race-based use of them; the peremptory-challenge system "permits [particular prosecutors] 'to discriminate who are of a mind to discriminate'"; the issue for a particular criminal defendant is whether there was discrimination "in his case," not that of others) (emphasis omitted); *Georgia v. McCollum*, 505 U.S. 42, 47 (1992) ("[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based *solely* on the prosecutor's exercise of peremptory challenges *at the defendant's trial*.") (emphasis added); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. . . . [E]valuation of the [particular] prosecutor's state of mind [is] based on [his or her] demeanor and credibility. . . .").

against interstate commerce.[6]

B. "Me, Too" Evidence Thus Is Relevant Only Where The Proffered Witness Sheds Light On The Motivations Of The Plaintiff's Decisionmaker.

The proper approach to evaluating the disputed evidence in this case follows from the foregoing principles. At issue here are discrimination allegations (i) by persons who had no connection to the plaintiff, (ii) against persons who had no connection to the plaintiff. Third-party witness testimony of course is properly admissible if the nonparty witness' testimony sheds light on the motivation of the plaintiff's decisionmaker(s). But such evidence is not relevant, and therefore not admissible, if the nonparty witnesses simply would assail different decisionmakers who lack nexus to the plaintiff.

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6. *E.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (order requiring hydroelectric energy produced in New Hampshire to be sold therein violated the Commerce Clause, where the decisionmaker -- the New Hampshire Public Utilities Commission — "made clear that its order [was] designed to gain an economic advantage for New Hampshire citizens at the expense of . . . neighboring states"); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 325-28 (1977) (New York statute exempting in-state securities transactions from transfer tax violated the Commerce Clause, where the legislative history and governor's statements confirmed that "the purpose of the new law was to 'provide long-term relief from some of the competitive pressures from outside the State'") (citation omitted); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 528, 540 (1949) (New York licensing requirement for milk processors violated the Commerce Clause as applied, where the decisionmaker — the Commissioner of Agriculture and Markets — stated that the requirement was intended to curtail competition from out-of-state processors).

The issue regularly arises in the lower-court cases. One of the most cited is the Second Circuit's decision in *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984). In that case the plaintiff alleged that his supervisor discharged him because of age. At trial, the district court permitted the plaintiff to call as witnesses six former employees, all of whom testified that they, too, were discharged because of age. A jury awarded damages to the plaintiff, but the Second Circuit reversed. The district court should have excluded the testimony of the six former employees as both irrelevant and unfairly prejudicial, the court held: "[T]heir testimony, aside from presenting unnecessary collateral issues, provided 'no basis for an inference of discrimination,'" because the circumstances of the six others bore no logical relationship to the plaintiff. *Id.* at 121 (citation omitted); *accord Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985) (statements by individuals with no nexus to the challenged employment decision have no bearing on the plaintiff's claim) (citing *Haskell*, 743 F.2d at 121). Thus, the "me, too" evidence was "insufficient to show a pattern and practice of discrimination." *Id.* at 122.

The Fifth Circuit held similarly in *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), *overruled on other grounds by Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990). In that case plaintiff sued for race discrimination. The district court declined to permit plaintiff to present testimony from three witnesses, each of whom wished to contend that he or she also was a race discrimination victim. Defendant won at trial, and plaintiff appealed. The Fifth Circuit affirmed the district court, holding that the proffered "me, too" evidence simply was not relevant because it shed no light on plaintiff's circumstances. Explained the Fifth Circuit:

> To prevail he had to show that Conoco purposefully discriminated against him. The witnesses Goff

> wanted to call could not testify as to Conoco's motive, intent, or purposefulness in failing to promote Goff. None of them had worked with Goff at Conoco, and none had any knowledge of Goff's experience or relationship with the company. All the witnesses could have testified to was their own individualized dealings with Conoco. Because none had worked in Goff's department, their testimony would not have concerned the same supervisors of whom Goff complained. Because this testimony would not have related to the issue of whether Goff suffered discrimination, the court did not err in refusing to admit this testimony.

678 F.2d at 596-97.

The Fifth Circuit more recently elaborated on that rule in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000). In that case two plaintiffs sued for age discrimination. The district court permitted plaintiffs to elicit "testimony pertaining to other employees in other branches of the company who held different positions under different supervisors," all of whom contended that they, too, were discharged based on age. *Id.* at 298. Plaintiffs prevailed at trial and were awarded damages. The Fifth Circuit reversed and granted a new trial because "[s]horn of this . . . irrelevant evidence, the judgment cannot stand." *Id.* Plaintiffs contended that the testimony was relevant because it tended "to show that United Companies, a company of 2700 employees, had 'a pattern or practice' of discriminating against older workers." *Id.* at 302. The court rejected the contention: "A 'pattern or practice' of discrimination does not consist of 'isolated or sporadic discriminatory acts by the employer.'" *Id.* (quoting *Cooper*, 467 U.S. at 875).

"Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff," the court held. 212 F.3d at 302. That was not the case in *Wyvill*; "testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge." *Id.*

The Sixth Circuit said the same thing in *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997). The plaintiff in that case alleged race discrimination in hiring. He sought to buttress his case by calling as a witness another African-American applicant, who also had not been hired. The district court excluded the evidence, and the Sixth Circuit affirmed. Considerations such as whether the plaintiff and witnesses applied for the same position, and whether they did so at the same time, were part of the court's ultimate inquiry as to whether the plaintiff and the disputed witness had the same decisionmaker. *Id.* at 1130. Because the proffered evidence involved a different position, requiring different qualifications, and a different decisionmaker, it had "no apparent connection" to plaintiff's application for employment and thus was properly excluded. *Id.*

In an earlier case from the same court, *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the court reasoned similarly. The plaintiff was laid off from his job along with others as the business downsized by approximately 33%. *Id.* at 154. Plaintiff sued, alleging age discrimination. At trial, plaintiff sought to buttress his case with testimony from two other older workers who were laid

off from two other sites within approximately a year of plaintiff's own layoff. The two testified that they had heard their own supervisors make discriminatory, ageist comments. The jury ruled for plaintiff and awarded damages. The Sixth Circuit reversed and granted a new trial, holding that the two witnesses' testimony was irrelevant. The court emphasized that the plaintiff and nonparty witnesses did not share the same decisionmaker-supervisor: the "me, too" witnesses worked in different geographical areas than the plaintiff, under different supervisory chains. Thus, the court concluded, "there was no evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision to terminate Schrand." *Id.* at 156. In language equally applicable to the instant case, the court explained: "The fact that two employees of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told they were being terminated because they were too old, is simply not relevant to the issue in this case." *Id.*

Another of the most-cited decisions on the issue is an early district court case summarily affirmed by the Third Circuit, *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980). That case, like the instant one, alleged age discrimination in a layoff. Plaintiff sought to introduce testimony from five other employees laid off at the same time, each alleging that he, too, was laid off based on age. The district court excluded the evidence, and the trial resulted in a defense verdict. The court denied a new trial motion that alleged evidentiary error, and the Third Circuit affirmed: "[T]o the extent testimony of each witness was about his own lay off, it was not relevant to [plaintiff]'s lay off." the district court declared. *Id.* at 392.

These cases fit comfortably within the taxonomy of discrimination proof applied in other contexts. Courts require nexus to the decisionmaker before assigning probative value to discriminatory remarks,[7] comparative evidence,[8] statistical

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7. *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489, 491 (7th Cir. 2007) (holding not probative discriminatory remarks by persons who played no role in plaintiff's layoff decision, including comments made during a conversation between Quotesmith's general counsel and a human resources official regarding the large number of employees over 40 years old who were being laid off; to "provide an inference of discrimination" a discriminatory remark must be "(1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action"); *Yates v. Rexton, Inc.*, 267 F.3d 793, 799 (8th Cir. 2001) (affirming summary judgment in a case alleging age discrimination in layoff; Yates presented "the statements of various [company] managers about him specifically and about age in general," including remarks by a supervisor named Zei; but it was a different decisionmaker, Wright, who made the decision to include Yates in the reduction-in-force, without input from Zei or anyone else, so as a result any bias by Zei or others was not probative); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (affirming summary judgment; plaintiff relied on obviously discriminatory remarks by one of the defendant's senior staff, Berglund; however, "Berglund was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by [the decisionmaker,] Leeds.").

8. *E.g.*, *Rivera v. City & County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004) ("Comparisons of actions taken by other supervisors would have no probative value regarding the motivation for actions by a particular supervisor. Accordingly, we conclude that the general rule — that employees cannot be considered similarly situated unless they share the same supervisor — applies in this case . . . ."); *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) (affirming summary judgment; proffered comparators, who reported to supervisors different from plaintiff's, were not probative of discrimination; "When different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects.") (quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994)).

proof,[9] and supposedly mendacious explanations for adverse employment decisions.[10] In all of those contexts the evidence is probative, or not, based on its nexus to the decisionmaker.

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9. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indust.*, 328 F.3d 309, 320 (7th Cir. 2003), for example, held:

> In order to be considered, the statistics must look at the same part of the company where the plaintiff worked; include only other employees who were similarly situated with respect to performance, qualifications, and conduct; the plaintiff and the other similarly situated employees must have shared a common supervisor; and the treatment of the other employees must have occurred during the same RIF as when the plaintiff was discharged.

Accord Hemsworth, 476 F.3d 487, 492 (7th Cir. 2007) (statistics must be drawn from persons affected by the same supervisor-decisionmaker; "Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods.").

10. *E.g.*, *Peters v. Lincoln Electric Co.*, 285 F.3d 456, 474 (6th Cir. 2002) (the defendant's chief financial officer, Elliott, demoted plaintiff based on certain performance-related dissatisfactions; plaintiff sought to prove mendacity with affidavits from and evaluations by the employer's former executives, praising his performance; the court held that, because plaintiff had not proven a shifting articulated nondiscriminatory reason *by Elliott*, the decisionmaker, the evidence was not probative; "It is simply stating the obvious to observe that what may have satisfied one management regime does not necessarily satisfy its successor, and Plaintiff's proffered evidence does not serve to rebut Lincoln's current management's view regarding Peters' insufficient skills to continue performing in the Controller position.") (emphasis omitted); *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876-77 (7th Cir. 2002) (affirming summary judgment; inaccuracies and false and inconsistent statements made by plaintiff's supervisor (Anderson), and the HR manager (Wittig) regarding plaintiff's termination raised no

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C. The Court Of Appeals Here Strayed From These Principles; The Evidence At Issue Was Substantively Irrelevant Because It Bore No Relationship To Mendelsohn's Layoff Decisionmaker.

The district court properly excluded — indeed, it would have been prejudicial error to admit — testimony from the five former employees Mendelsohn proffered as witnesses.

1. The five disputed witnesses could shed no light on Mendelsohn's layoff or Mendelsohn's decisionmaker.

Neither Mendelsohn's supervisor (Fee), the layoff decisionmaker (Reddick), nor Reddick's own boss (Blessing) supervised (directly or indirectly) any of the five disputed witnesses. The five were laid off as many as nine months before Mendelsohn or as many as three months after. None of the five worked in the Business Development Strategy group, and no one in the Business Development Strategy group had anything to do with their layoffs. Three of the five witnesses sought to testify that they had either heard or been subjected to discriminatory ageist remarks by their various supervisors. Neither Blessing, Reddick nor Fee was alleged to have uttered those or similar remarks, and Mendelsohn never heard any ageist remarks herself. One of the three witnesses sought to testify that she had seen a spreadsheet

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triable question of pretext because neither Anderson nor Wittig participated in the termination decision; "An inference of pretext may be permissible only when *decisionmakers* make false or inconsistent statements about the circumstances of a particular employment decision.") (emphasis in original).

from a supervisor, to whom she did not report, suggesting that age was one of the criteria that particular supervisor may have considered in making layoff decisions. The supervisor in question did not work in the Business Development Strategy group. A fourth employee sought to testify that he had information that he had been given a false negative evaluation; that he had been banned from working at Sprint; and that he had witnessed harassment of another employee because of her age. None of these allegations had anything to do with Blessing, Reddick, Fee, or anyone else in Business Development Strategy. The fifth employee sought to testify that he had been replaced by a younger person, and that his repeated post-RIF job applications all were turned down. None of this pertained to Blessing, Reddick, Fee, or anyone in the Business Development Strategy group.

By contrast, the *relevant* evidence in the case focused on the decisionmaker. That was Reddick but, as noted, the district court eventually permitted both sides also to introduce testimony pertaining to decisions at the time of the layoffs by both Reddick and his boss, Blessing. Thus, for example, the jury heard evidence that Blessing was instructed to cut costs by 30% in Business Development Strategy; that he identified specific jobs as superfluous; that he decided to consolidate two units and make other structural changes within Business Development Strategy; and that an adverse-impact analysis had been conducted to measure the incidence of the RIF within Business Development Strategy. J.A. 319a-324a, 326a-332a, 333a-334a. Each layoff decision under Blessing was open to examination at trial. J.A. 292a-294a. Mendelsohn thus was allowed to introduce a spreadsheet containing the ages of every laid-off employee in Blessing's group, including those who were not under Reddick's supervision. J.A. 279a-297a, 298a-300a, 326a-332a. Her

counsel, relying on the spreadsheet, questioned Sprint witnesses about the layoffs of two protected-age individuals, Doug Reinhardt and Marc Elster. J.A. 300a-305a, 326a-327a. Reddick had played no role in those layoff decisions; Reinhardt and Elster were Reddick's peers. J.A. 332a-333a.

Sprint was accorded similar latitude. Sprint pointed out that older workers within Blessing's Business Development Strategy group were not disfavored; indeed, the oldest person in each job level within Blessing's group survived the RIF. J.A. 335a-336a. The jury also heard evidence that, at about the time of the layoff, Reddick accepted older workers into the Business Development Strategy group or assisted them in finding positions in other units as transfers. J.A. 312a-317a, 336a-337a, 338a-339a. In fact, the number of employees in Reddick's group who were over age 50 actually doubled following the transfers that Reddick accepted during the reorganization within the Business Development Strategy group. J.A. 335a. That of course was relevant because it tended to disprove that Reddick harbored any animus against older workers.

Mendelsohn in the past has contended that the evidentiary focus, limited to decisions within Business Development Strategy, had the effect of portraying Sprint's decisionmaking in a favorable light. That contention demonstrates no vice in the district court's evidentiary ruling, however, but rather that — whatever may have occurred elsewhere — *Reddick and Blessing* simply did not engage in age discrimination.[11]

11. This is not to say that Sprint entirely agrees with the district court's evidentiary test. Sprint believes that the district court erred by *expanding too much* the scope of the trial, over Sprint's objection. (Cont'd)

2. Mendelsohn failed to lay any foundation of relevance for the testimony of the five disputed witnesses.

If Mendelsohn's proffered evidence — say, the ageist remarks — were accurately reported, Sprint condemns them. It does not follow, however, that such evidence has anything to do with Mendelsohn's own discrimination claim. The defense jury verdict demonstrated that Sprint did not discriminate against Mendelsohn herself. The proffered evidence at the very worst hinted that Sprint's equal-opportunity record might have "bruise[s]" elsewhere, *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880 (1984), but Mendelsohn failed to lay the evidentiary foundation of nexus between any such bruises and her own particular claim.

a. The proffered evidence was not relevant to any common scheme or plan.

The court of appeals majority thought the evidence relevant because it tended to show a common scheme or plan to discriminate. Pet. App. 5a-6a. It certainly is true that, if there is evidence of a common scheme or plan — say, an

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Reddick was the decisionmaker, and the proper scope of proof should have focused on his decisions only. That is what the district court originally ruled *in limine*. Later, however, the court also allowed about decisions made or approved by Reddick's boss, Blessing. Sprint believes that the district court actually gave Mendelsohn too much evidentiary latitude, but the defense verdict renders moot Sprint's belief that it, rather than Mendelsohn, was the party legitimately aggrieved over the scope of the evidence allowed at trial.

expression of ageist attitudes by senior management,[12] provided that they are accompanied by foundational proof that they likely tainted decisionmaking in the particular plaintiff's case[13] — a district court in an appropriate case could find a link

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12. *E.g.*, *Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 621 (8th Cir. 1998) (reversing summary judgment for defendant based in part on the plaintiff's allegation that the defendant's Acting Director allegedly made a racially discriminatory statement); *Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1475 (9th Cir. 1995) (affirming jury verdict for plaintiffs where allegedly ageist statements by the company President/Executive Director gave rise to "reasonable inferences" that the plaintiffs were denied promotions based on age); *Ryder v. Westinghouse Elec. Co.*, 128 F.3d 128, 130-34 (3d Cir. 1987) (affirming jury verdict for plaintiff in discharge case alleging age discrimination; ageist statements by the CEO and persons speaking for him were relevant; even though the speakers were not decisionmakers in plaintiff's discharge, a jury could find that they set forth a company policy followed by others); *cf. Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001) (affirming summary judgment despite finding that the district court failed to accord sufficient weight to discriminatory statements by the Chief Executive; "When a major company executive speaks, 'everybody listens' in the corporate hierarchy. . . .") (quoting *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989)).

13. *See, e.g.*, *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996) (affirming summary judgment notwithstanding "age-related remarks allegedly made to [plaintiff] by CEO Kimzey"; the remarks were "vague and remote in time," and hence not probative); *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 251, 252 (8th Cir. 1995) (affirming summary judgment even though the company president years earlier had written a document that among other things outlined a management initiative to hire and retain "the best young people"; plaintiff failed "to prove a causal relationship between [the document] and his layoff"); *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 763-64 (8th Cir. 1995) (affirming summary judgment in a discharge case alleging age

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between a plaintiff's circumstances and those of others. *Cf. Miller-El v. Dretke*, 545 U.S. 231, 253, 263 (2005) (analyzing discrimination in jury selection; the appearance of discrimination drawn from statistical and comparative evidence in this particular case "is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries").

There was no such evidence in this case, however. This was not a pattern-or-practice case, and Mendelsohn simply failed to lay the proper evidentiary foundation to establish the relevance of the circumstances of the five disputed witnesses. Absent that evidentiary foundation, the circumstances of the five were irrelevant. Sprint respectfully suggests that the court of appeals' reasoning was "completely circular and explain[ed] nothing," *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 444 (2003) (citation omitted). According to the court of appeals majority, "me, too" evidence becomes admissible if there is a company-wide scheme or plan — and such a scheme or plan necessarily exists if there are "me, too" witnesses. But proof of a pattern or practice requires "more than the mere occurrence of isolated . . . or sporadic discriminatory acts." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The five "me, toos" here, none with any nexus to Mendelsohn or persons who arguably were decisionmakers as to her, thus at worst would allege just those sorts of "isolated" or "sporadic" acts.

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discrimination, even though the CEO had written a memo stating that "people over 45 years of age, including myself, generally have serious difficulty adjusting to change"; the discharge decision was made by another supervisor, and plaintiff failed to prove a link between the memo and the discharge); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991) (affirming summary judgment despite arguably discriminatory remarks by the retiring CEO Brown; there was no reason to believe that the successor CEO adhered to the views expressed).

Equally unpersuasive was the majority's effort to reconcile its opinion with prior Tenth Circuit precedent. That court in the past had correctly analyzed relevance based on whether the proffered proof involved the same supervisor-decisionmaker. *E.g.*, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). *Aramburu* was inapposite, according to the majority, because that case involved an allegation of discriminatory *discipline*, and this one involves an allegation of discrimination *in layoff*. Pet. App. 7a-9a. That is a distinction without a difference. Both scenarios involve employment decisionmaking by individual supervisors according to their particular assessments of business needs. Thus, both RIF and discipline cases — indeed all cases of alleged disparate treatment — test the decisionmaker's state of mind. The rules of relevance do not vary based on the nature of the adverse employment action at issue. The court of appeals majority seemed to believe that employers in discipline cases make decentralized decisions, but that in layoff cases company-wide master plans are imposed from the top. Certainly one could conceive of such a case, but the layoffs here were not of that sort. Decisionmaking was decentralized (J.A. 310a-312a, 341a), and Mendelsohn therefore failed to lay the foundation necessary to link evidence of one department's supposed biases to decisions made in another.

b. The proffered evidence was not relevant as "background."

Sprint anticipates that Mendelsohn will contend that the circumstances of the five disputed witnesses have some peripheral relevance as "background," relevant to show a "climate" or "atmosphere." But the Federal Rules of Evidence impose more rigor than analytically foggy concepts like these.

Cf. Ash v. Tyson's Foods, Inc., 546 U.S. 454, 457 (2006) (rejecting an "unhelpful and imprecise" standard for evaluating discrimination evidence). Disciplined analysis of facts at a trial can be tainted by injecting inflammatory claims untethered to a plaintiff's particular circumstances. Before such evidence may be admitted, the proponent must lay — not assume — the foundation of relevance. The proponent, using evidence rather than supposition, must link any supposed "background" to the specific act and scene featuring the plaintiff and his or her decisionmaker.

Without that foundational link, the evidence should be excluded. *See, e.g., Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 360 (7th Cir. 2001) (affirming summary judgment in age discrimination case arising out of a RIF; the claim that plaintiff's employer "had an age-discriminatory 'culture'" was insufficient to establish a prima facie case); *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1010 (10th Cir. 2001) (affirming summary judgment; there was no demonstrated nexus between an alleged "culture of racial hostility" and plaintiff's discharge); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 18 (1st Cir. 1994) (affirming summary judgment; plaintiff's claim that her supervisor's comment "suggest[ed] a 'men's club' atmosphere" was irrelevant because her supervisor played no role in the termination decision); *EEOC v. U.S. Steel*, 649 F. Supp. 964, 967 (W.D. Pa. 1986) (granting summary judgment in a RIF case; plaintiff's claim of "an age-biased atmosphere" bore no relationship to "the decision-maker's motivation for the [RIF]").[14]

14. Thus, cases like *Cummings v. Standard Register Co.*, 265 F.3d 56, 63 ("atmosphere") (1st Cir. 2001), *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) ("background"), and *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988) ("climate"), *superseded in part on other grounds, Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989), should be disapproved.

The court of appeals majority thought the disputed evidence might be enough to cause a jury to "raise an eyebrow" at the circumstances of Mendelsohn's own layoff. Pet. App. 14a. But discrimination proof must be analyzed with precision, not physiognomical allusions. *Ash*, 546 U.S. at 457-58 (disapproving a standard for assessing proof that required evidence "virtually to jump off the page and slap you in the face"). Nor, in any event, was the disputed evidence sufficient to cause anyone to "raise an eyebrow." Sprint laid off more than 15,000 employees in a series of RIFs over more than 14 months during the telecommunications industry's implosion. It is hardly surprising that Mendelsohn could find five other persons — 0.003% of that total — who would claim that Sprint selected them because of their age.

c. Discrimination cases are not exempt from normal rules of foundation and relevance.

Mendelsohn likely will contend that a decisionmaker's state of mind is not easily proven, so she should be given latitude to stray from normal evidentiary principles. This Court's cases provide the two dispositive responses.

First, while it is true that "the question facing triers of fact in discrimination cases is both sensitive and difficult [as] [t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983). "The law often obliges finders of fact to inquire into a person's state of mind," this Court said, and "The state of a man's mind is as much a fact as the state of his digestion. . . . [I]f it can be ascertained it is as much fact as anything else." *Id.* at 716-17 (citation and internal quotation omitted).

Second, probing a decisionmaker's state of mind is what discovery is for:

> Some will complain that [a] specific causation requirement is unduly burdensome on [discrimination] plaintiffs. But . . . discovery . . . give[s] plaintiffs broad access to employers' records in an effort to document their claims. . . . Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link to a protected-group status such as race or age.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-58 (1989) (adverse impact case), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *accord Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (assigning the plaintiff the burden of proof will not mean that meritorious complaints go unproven; the "discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files"); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 193 (1990) (ordering discovery of a university's peer-review files in a tenure dispute, because that is where any evidence of discriminatory intent is likely to be found).

As shown above, a discrimination plaintiff must lay the foundation for a proffered witness by showing a link between that witness and plaintiff's own circumstances and decisionmaker. Here, discovery provided Mendelsohn a full and fair opportunity to establish that link, but she could not do it. The necessary evidentiary foundation therefore did not exist.

Mendelsohn's real purpose in proffering the five disputed witnesses — and the prejudice that would have resulted if, erroneously, they had been permitted to testify — thus becomes clear. Mendelsohn lacked the accepted forms of proof of the *decisionmaker's* motive, so she sought to sully the corporate defendant in the jury's eyes with allegations by others, against others. Whether those other allegations were factually accurate or not is beside the point. They shed no light on Mendelsohn's decisionmaker's motivations in selecting *her* for layoff, and yet if erroneously admitted in a jury trial they would have caused great prejudice. Federal Rule of Evidence 401 provides that relevant evidence must have some tendency in reason to make a "fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The disputed witnesses here had nothing at all to do with the "fact . . . of consequence" — the decisionmaker's motive — and it was irrelevant for that reason.

The rule resulting from this case should be simple and categorical: "me, too" evidence always is inadmissible, absent a demonstrated link between it and the specific decision challenged by the plaintiff and plaintiff's decisionmaker.[15] Because the district court here properly

15. The instant case is an individual disparate treatment case, not a hostile-environment harassment case. Thus, this Court need not decide whether a different rule of relevance applies in that context. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 61 (1986) (noting, without deciding the issue, that "the District Court did not allow [Vinson] to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief") (internal quotation omitted). And, of course, nothing in this case affects established principles of procedure in

(Cont'd)

excluded the proffered evidence, the jury verdict in Sprint's favor should be reinstated.

II. THE DISPUTED EVIDENCE WAS PROPERLY EXCLUDED, GIVEN THE WIDE LATITUDE ACCORDED DISTRICT COURTS UNDER FEDERAL RULE OF EVIDENCE 403

The disputed evidence should have been excluded as irrelevant for the reasons set forth above. The court of appeals held, however, that such evidence not only was admissible, it *never may be excluded*, even under Federal Rule of Evidence 403. But Rule 403 provides that district courts should exclude otherwise-admissible evidence, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This Court should not have to reach the Rule 403 issue, but Rule 403 provides a further reason to reverse the court of appeals.

A. The Evidence Would Have Caused Undue Delay And Wasted Trial Time.

This Court regularly has noted the broad discretion district courts have to exclude evidence that will unduly consume trial time, especially where trials-within-a-trial would occur. *E.g.*, *Crane v. Kentucky*, 476 U.S. 683, 689-90

(Cont'd)

bona fide class actions, where it has long been established that anecdotal evidence supplements statistical proof to "[bring] the cold numbers convincingly to life." *Teamsters v. United States*, 431 U.S. 324, 339 (1977). The instant case is not a class action or pattern-or-practice-case, as the Pretrial Order revealed. J.A. 127a-154a.

(1986) (district judges have "wide latitude to exclude evidence that is . . . only marginally relevant or poses an undue risk of . . . prejudice [or] confusion of the issues") (citation and internal quotation omitted).

The admission of the kind of disputed evidence here needlessly would burden the courts. Trials would expand substantially in size if district courts must permit trials-within-a-trial on the circumstances of nonparty witnesses. For every piece of evidence a plaintiff presented as to a "me, too" witness, the employer would be entitled to counter with what might be called "not you, either" evidence, to rebut their claims. The employer would have to be allowed to present, for each of the witnesses, testimonial and documentary evidence of performance shortcomings or skills limitations, whatever led the decisionmaker to put that individual on the layoff list. The employer also would be entitled to introduce proof about other older workers who were *not* laid off, to show that older workers as a group were not disfavored. All this injects into the case witnesses who had no involvement with the plaintiff, and documentary evidence that had no bearing on the plaintiff. Thereafter, the plaintiff in turn could produce additional testimonial and documentary evidence in reply to the various components of the defendant's showing. As the court described in *Moorhouse*, this would compound the case geometrically, by requiring numerous trials-within-a-trial:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own lay off. . . . Defendants then would have been placed in the position of either presenting the justification for each witnesses' lay off, or of allowing the testimony to stand

> unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

501 F. Supp. at 393 (footnote omitted).[16]

As a result, numerous courts of appeals have held that Rule 403 is a proper basis for excluding "me, too" evidence. *E.g.*, *Wyvill*, 212 F.3d at 303 (trial court's admission of this evidence entitled defendant "to respond to each witness's claims, and creat[ed], in effect, several 'trials within a trial'"; these "mini-trials were not probative on the issue of whether [the plaintiffs] faced discrimination"); *Williams*, 132 F.3d at 1130 (the admission of "me, too" evidence would have required the defendant to present testimony explaining why a nonparty witness had not been hired).

B. The Evidence Would Have Created The Risk Of Confusion Of The Issues, Or Misleading The Jury.

This Court similarly has recognized that district courts have broad discretion to exclude even relevant evidence that could be misleading or confusing. In *United States v. Hale*, 422 U.S. 171 (1975), for example, the introduction of

---

16. Trials-within-a-trial already occurred to some extent, when the trial judge expanded the scope of evidence beyond Reddick's layoff decisions to the entire Blessing organization. Sprint was forced to go through the entire list of Business Development Strategy group layoffs to demonstrate no age discrimination as to any older worker in that group. *See supra* note 11.

evidence regarding the defendant's silence at the time of his arrest created an intolerably high risk of jury confusion. "The danger," this Court explained, "is that the jury is likely to assign much more weight to the [challenged evidence] than is warranted. And permitting the defendant to explain . . . is unlikely to overcome the strong negative inference that the jury is likely to draw. . . ." *Id.* at 180; *see also Hamling v. United States*, 418 U.S. 87, 127 (1974) (in criminal prosecution of defendants charged with mailing obscene materials, district court did not abuse its discretion in refusing to admit allegedly comparable materials; courts have "considerable latitude" in rejecting or limiting evidence that "would tend to create more confusion than enlightenment in the minds of the jury").

The disputed evidence here risks confusion of the jury, because the proliferation of claims (and claimants) distracts the jury from a proper focus on the circumstances of the plaintiff. Here again the Tenth Circuit majority departed from the rule applied in similar cases. *See Williams*, 132 F.3d at 1130 ("me, too" testimony was both irrelevant and properly excluded under Rule 403 in any event; "[T]he testimony would have led to a confusion of the issues . . . ."); *Schrand*, 851 F.2d at 156 ("[T]he testimony tended to confuse the issue by focusing the jury's attention on two totally unrelated events, a consideration under Rule 403. . . . [T]here was a distinct danger that the jury would assume a connection that was never proven between the terminations of the two witnesses and that of Schrand."); *Wyvill*, 212 F.3d at 303 ("By admitting this evidence, the district court substantially prejudiced [defendant]. . . . [These witnesses] distracted attention from the fact that they had little to say about [plaintiffs'] terminations.").

C. The Evidence Would Have Caused Unfair Prejudice.

Finally, this Court has recognized that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice." *See Clark v. Arizona*, 126 S. Ct. 2709, 2732 (2006); *accord Old Chief v. United States*, 519 U.S. 172, 180 (1997) (adopting the Advisory Committee's statement that evidence should be excluded as unfairly prejudicial if it creates "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

The disputed evidence here would cause unfair prejudice, particularly in a reduction-in-force case like this one. The essence of a RIF is that an adequately performing incumbent is released when the employer makes a judgment that it needs to cut back. Rarely can an employer defend a RIF case with proof of an employee's incompetence or misconduct; if the employee were unfit for the job, he or she already would have been discharged. *See, e.g., Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 924 (7th Cir. 1996) (affirming summary judgment; "These flaws [in performance] were not serious enough to call for [the employee's] immediate dismissal, but when [the company] was faced with [the need to reduce force] these flaws naturally figured into [the company's] decision regarding which service engineer to let go."); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 694 (7th Cir. 2006) ("Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual."), *cert. denied*, 127 S. Ct. 2973 (2007).

It logically follows that most any RIF plaintiff can present a plausible argument that he or she could have retained

employment if only the decisionmaker had used other selection criteria or weighed them differently. The possibility of second-guessing is endless. As a result, in any RIF axiomatically there will be personable, sympathetic and attractive persons, not incompetent or unethical, each with a story to tell about how he or she sacrificed for the company, only to be released in an economically motivated cutback. Juror sympathy to these individuals is inevitable, and Rule 403 exists to prevent unfair prejudice to the defendant employer. As the Sixth Circuit explained in *Schrand*:

> [T]he impact of the two former employees' testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided — whether [plaintiff] was discharged because of his age — this testimony embellished the circumstantial evidence directed to that issue. . . . [with] an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff]'s favor.

851 F.2d at 156.

Armed with the plaintiff and a band of "me, toos," plaintiff's counsel in a layoff case will indict the company for committing management. For the trial to be fair, district judges must retain the discretion to declare that such proof is unfairly prejudicial. As the Second Circuit said in a similar case, reversing a jury verdict for plaintiff abetted with "me, too" proof: "'[E]ven the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age.'" *Haskell*, 743 F.2d at 122, *quoting Moorhouse*, 501 F. Supp. at 393 n.4.

The court of appeals was plainly wrong in holding it to be reversible error to exclude the disputed evidence under Rule 403.

CONCLUSION

This Court should reverse the court of appeals and reinstate the jury verdict. The proffered evidence was substantively irrelevant under Rule 401. It was not reversible error to *exclude* such irrelevant evidence; to the contrary, it would have been reversible error to *admit* it. Alternatively, and at a minimum, the district court did not abuse its discretion in excluding the evidence, given the wide latitude accorded trial judges under Rule 403.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 06-1221

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED JUNE 11, 2007

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

General Docket
United States Court of Appeals for the 10th Circuit

Lower court information:

District: 1083-2:03-CV-2429-KHV
Ordering Judge: Kathryn H. Vratil, District Judge
Court Reporter: Theresa E. Hallberg, C.S.R.
Date Filed: 8/27/03
Date order/judgment: 2/28/05
Date NOA filed: 3/29/05

Fee status: paid

Prior cases:
None

Current cases:
None

Docket as of June 18, 2007 8:03 pm

Proceedings include all events.

05-3150 Mendelsohn v. Sprint/United Mgmt.

Appendix A

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Appendix A

v.

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Defendant - Appellee

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Appendix A

05-3150 Mendelsohn v. Sprint/United Mgmt.

ELLEN J. MENDELSOHN,

Plaintiff - Appellant,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant - Appellee.

11/1/06 — Opinion and judgment of the United States Court of Appeals for the Tenth Circuit.

11/15/05 — Defendant's petition for rehearing *en banc* filed.

11/20/06 — Order of the United States Court of Appeals for the Tenth Circuit denying Defendant's petition for rehearing *en banc*.

3/13/07 — Defendant's petition for a writ of *certiorari* filed.

6/11/07 — Order of the United States Supreme Court granting Defendant's petition for a writ of *certiorari*.

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

U.S. District Court
District of Kansas (Kansas City)
CIVIL DOCKET FOR CASE #: 2:03-cv-02429-KHV

Mendelsohn v. Sprint/United Management Company
Assigned to: District Judge Kathryn H. Vratil
Demand: $75,000
Case in other court: 10CCA, 05-03150
Cause: 29:621 Job Discrimination (Age)

Date Filed: 08/27/2003
Date Terminated: 01/30/2007
Jury Demand: Plaintiff
Nature of Suit: 442
Civil Rights: Jobs
Jurisdiction: Federal Question

8/27/03 — Plaintiff's complaint filed in the United States District Court for the District of Kansas.

10/10/03 — Defendant's answer filed.

7/22/04 — Defendant's motion for summary judgment filed.

11/29/04 — Order entered overruling Defendant's motion for summary judgment.

12/15/04 — Defendant's motion *in limine* filed.

Appendix B

1/3/05 — Minute order entered granting Defendant's motion *in limine*.

1/13/05 — Jury verdict in favor of Defendant.

1/13/05 — Judgment of District Court entered.

1/28/05 — Plaintiff's motion for a new trial filed.

2/28/05 — Order entered overruling Plaintiff's motion for a new trial.

3/29/05 — Plaintiff's notice of appeal filed.

APPENDIX C — COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS FILED AUGUST 27, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

JURY TRIAL DEMANDED

ELLEN J. MENDELSOHN
2712 West 141st Street
Leawood, KS 66224

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY
6500 Sprint Parkway
Overland Park, KS 66251

(SERVE: Corporation Service Company
Registered Agent
200 SW 30th Street
Topeka, KS 66611)

Defendant.

Appendix C

COMPLAINT

Parties, General Allegations, Jurisdiction and Venue

1. Plaintiff, Ellen J. Mendelsohn is an individual residing in Leawood, Kansas 66224.

2. Defendant Sprint/United Management Company, (hereinafter "Sprint") is a Kansas corporation, duly organized and existing under the laws of the state of Kansas, and maintains an office for the conduct of its ordinary and customary business in Overland Park, Kansas, at 6500 Sprint Parkway. Defendant Sprint is therefore doing business in this judicial district.

3. Defendant, at all times relevant hereto, is and has been an "employer" within the meaning of Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, 29 U.S.C. § 630 (b) ("ADEA").

4. Defendant employs (and at times relevant hereto employed) more than 500 employees.

5. Both jurisdiction and venue are proper in this Court, because federal questions are involved, and because the unlawful employment practices and all other transactions were committed within this judicial district. Venue is therefore proper in this Court, pursuant to the provisions of Section 7 of the Age Discrimination In Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621, *et seq.*, 28 U.S.C. § 1331 (federal question) and § 1391 (b)(c) (venue).

6. This Court has jurisdiction of this cause of action, pursuant to Section 7 of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621, *et seq.* and 28 U.S.C. § 1331 and 1343 (3).

Appendix C

GENERAL ALLEGATIONS

7. Plaintiff hereby incorporates paragraphs 1 through 6 of this Complaint, by reference, as if fully set forth in this Count I.

8. Plaintiff is a female born August 8, 1951. She was employed by Sprint from September 12, 1983 to September 5, 1986. Plaintiff later was rehired by Sprint February 27, 1989. She continued her employment until her termination on November 22, 2002.

9. Prior to November 14, 2002, plaintiff held the position of Manager III in defendant's Business Development Strategy Group – Mobile Financial Services, Job Grade 79. On November 14, 2002 defendant notified plaintiff she was terminated effective November 22, 2002 as a result of a reduction-in-force (RIF).

10. During plaintiff's employment with Sprint, plaintiff performed her job duties in a satisfactory (or better) manner.

11. On or about April 14, 2003 plaintiff filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). Said charge of discrimination were assigned Charge No. 281-2003-01746. The EEOC investigated plaintiff's charge of discrimination and issued plaintiff her Notice of Right to Sue on or about June 12, 2003, a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference.

12. This action has been commenced by the filing of this Complaint within ninety (90) days after plaintiff's receipt of the aforesaid Notice of Right to Sue; therefore, plaintiff has duly met all administrative requirements of the ADEA.

Appendix C

13. At the time of defendant's unlawful conduct toward plaintiff, and thereafter, defendant Sprint has retained and continues to employ younger individuals, in jobs for which plaintiff is and was qualified.

14. In last August, 2003, approximately 2 1/2 months prior to plaintiff's termination, a younger male, Chris Bierbaum, was transferred into her group as a Manager, Grade 78.

15. At the time of plaintiff's termination in November, 2002, there were four (4) groups within defendant's Business Development & Strategy department called Incubator Groups. There were three (3) other managers within plaintiff's group besides plaintiff. All three (3) of the other managers were under the age of 40. Plaintiff was the oldest manager in her group.

16. In the other three (3) groups within defendant's Incubator Groups, there were twelve (12) other managers in jobs which plaintiff was qualified to perform by education and experience. All twelve mangers were younger than plaintiff. All kept jobs within Sprint. No other basis than age discrimination would explain why plaintiff, the oldest manager in the entire Incubator Groups, was the *only* manager terminated as a result of the so-called reduction-in-force.

17. Immediately *after* plaintiff's termination on November 22, 2003, two younger individuals under the age of 40, Whitney Siavelis and Dan McCauley, were transferred *into* plaintiff's group in Manager positions, Grade 78. Siavelis had been assigned "special assignment" which within Sprint means you will no longer have a job once the "special assignment" is completed. It is well-known at Sprint that "special assignment" ordinarily is the "kiss of death." McCauley was transferred from

another department within the Business Development & Strategy Department into plaintiff's group. However, in this case, plaintiff was terminated and these two younger individuals were transferred into her group as Managers.

18. The project plaintiff was working on with the others in her group continued on after plaintiff's termination. In fact, in plaintiff's one-on-one and six month performance discussions with her supervisor's before her termination, plaintiff was told that the project she was working on was "the most important project within the group."

19. Plaintiff has observed a pattern and practice of Sprint laying off, and not finding jobs for, well-performing employees in their late 40's, early 50's, and older. Instead, Sprint has separated or demoted employees in the protected age group, whereas for younger employees Sprint finds alternative jobs if the current jobs of younger employees are restructured or eliminated.

COUNT I—AGE DISCRIMINATION

20. Plaintiff hereby incorporates by reference each and every allegation and averment in paragraphs 1 through 19 above as though fully set forth herein.

21. Defendant Sprint discriminated against plaintiff on the basis of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*

22. Defendant Sprint, by and through its officers, employees and agents, engaged in a continuing pattern and practice of discrimination against or disparate treatment of plaintiff based upon plaintiff's age, in terminating plaintiff.

Appendix C

23. As a direct and proximate result of defendant's continuing pattern and practice of discrimination directed toward Plaintiff, or of the disparate treatment of plaintiff, plaintiff suffered actual damages in the form of lost wages, lost fringe benefits, loss of earning capacity, and in other respects, all in an amount yet to be determined, but not less than Seventy-Five Thousand Dollars ($75,000.00).

24. Defendant Sprint's actions were willful, entitling plaintiff to liquidated damages in an amount equal to the actual damages referred to in the preceding paragraph.

25. Plaintiff has already incurred and will in the future incur substantial attorney's fees and expenses in prosecuting her claim of discrimination.

WHEREFORE, plaintiff respectfully prays judgment in her favor and against defendant Sprint/United Management Company after jury trial: (1) awarding her back pay in an amount yet to be determined; (2) awarding her liquidated damages in an amount equal to her actual damages; (3) reinstating plaintiff to her Manager's position or its equivalent, with any promotions and pay increases she would have received in the interim; (4) in the alternative to reinstatement, awarding her front pay in an amount yet to be determined; (5) awarding her past and future lost fringe benefits in an amount yet to be determined; (6) permanently restraining defendant from ever again discriminating against plaintiff or any other individual on the basis of that individual's age; (7) awarding her the costs and expenses, including attorney's and expert witness fees, incurred in prosecuting her claims of discrimination; and (8) awarding such other and further relief as the Court deems just and proper.

Appendix C

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DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury of all issues so triable as a matter of right.

/s/ Dennis E. Egan

DESIGNATION OF PLACE OF TRIAL

Plaintiff designates Kansas City, Kansas as the place where this case should be tried.

/s/ Dennis E. Egan

Appendix C

EXHIBIT A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

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400 State Avenue
Kansas City, KS 66101

EEOC Charge No. *281-2003-01746*
EEOC Representative *Lawrence S. Warren, JR, Investigator*
Telephone No. *(913) 551-6641*

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

On behalf of the Commission
s/ George Dixon — 6-12-03
George Dixon, Director — *(Date Mailed)*

APPENDIX D — EXCERPTS FROM DEPOSITION OF JOHN BOREL DATED APRIL 19, 2004

ELLEN J. MENDELSOHN vs.

SPRINT/UNITED MANAGEMENT COMPANY

DEPOSITION OF JOHN BOREL

APRIL 19, 2004

[Commencing at page 5]

* * *

Q. What's your date of birth?

A. 14 September 1947.

Q. So you're currently 56 years old; is that correct?

A. I am.

* * *

[10] * * *

Q. When did you first begin working at Sprint?

A. 6 November 2000.

* * *

Appendix D

[12] * * *

Q. What was your title when you were first employed by Sprint?

A. I was Project Manager 3.

Q. While you were employed at Sprint, did you have any job titles other than Project Manager 3?

A. No.

Q. Do you recall what your job grade was as a Project Manager 3?

A. Yes, I did.

Q. What was that?

A. Well, in the project management area, there were certain things that I was supposed to be able to do at that level and as you go higher, those duties increase in complexity, that kind of thing.

* * *

Appendix D

[19] * * *

Q. . . . Prior to your termination of employment, had you applied for any [20] other position at Sprint between the time of your — strike that, I'm struggling, I apologize. While you were employed at Sprint, did you apply for any other role?

A. Only during my transition process after I was laid off.

Q. While you were employed by Sprint, did anybody ever tell you you could not apply for employment for other positions at Sprint?

A. I wasn't allowed to for a while, but they changed their mind.

Q. When were you not allowed to apply for other positions at Sprint?

A. Well, a week prior to me being laid off, I went to talk to Jay Cole who was the manager within our directorate who had a vacant PM position. He was wanting me to take that job and work with him and as — after I got laid off, I put in for that position and he had told me that I was not allowed to put in for this because I had been banned and that I had an adverse rating in my file.

Q. Do you remember the day that you spoke to Jay Cole?

A. It was about a week before I got laid [21] off. I got laid off on the 26th of February, 2003, so a week prior to that I guess, that time frame.

Appendix D

Q. Somewhere around February 19th of '03; is that correct?

A. I don't remember that exact date, but it was a weekday, it was not a weekend. I don't remember the date.

Q. Was the position that Jay Cole had available one that had been filed by somebody else or was it a new position, do you know?

A. It was filled by someone else.

Q. Who was that?

A. Project Manager 4, Martina Howell.

Q. And had Martina left the company at that time?

A. She had.

Q. Where did she go, do you know?

A. She went to take a job in South Africa with a telecommunications firm.

Q. When had Martina Howell left Sprint?

A. It was probably sometime in late January, early February. I don't know exactly when. I just know that she left probably a month before I got laid off.

Appendix D

[22] * * *

Q. Was anybody else with you when you spoke with Jay Cole about a vacant position?

A. No. He and I sat down, we went to a conference room and we talked about the position. He told me he thought I would be a very good fit for the job and that he wanted me on his team. I said, well, I would sure like to make the transition and he said he would talk to Mohammad Hussain about it.

Q. Did you approach your Mr. Cole about the position or did he approach you?

A. I think I approached him and then we set up a time to have me come in and talk to him about it. Not as a formal interview, but just to discuss the position and at that time he wanted me [23] to apply for the job.

Q. Did you apply for the job?

A. Yes, I did.

Q. When was that?

A. That was after I was laid off. I finally got through HR a copy of the JIR, they call it job interest, job information request or interest request, something like that. They sent it to me at my home. I filled it out in an hour or two, sent it right back in order to get my name in for that job.

Q. Did you fill that form out completely?

A. I did.

Q. Did you fill it out truthfully?

A. Yes, I did.

Q. Why did you approach Mr. Cole about this open project manager 4 position?

A. Well, I tell you what, I thought it would be a good position for me to get into. I knew Martina Howell, she had enjoyed it a lot. We were actually going through a big transition and that particular position was going to be the focal point dealing with the contract folks on different projects. So it would have changed my job from monitoring software testing to deal with [24] contracts. And as I understood it, the major programs were coming into the STIC Lab interdirectory and I would really be at a different level, hopefully it would be a promotion in it for me.

* * *

[26] * * *

Q. Did she tell you why she was talking over those duties?

A. Well, she didn't exactly tell me anything. She just did that and I tried to keep on top of things as best I could, but you know, now I guess it's apparent that she was taking over because she was taking over my job to make sure there was a transition between me and somebody else.

Q. Why was that apparent?

A. Well, after the fact, I got laid off. I mean, obviously I don't think she would have taken [27] over my job had she known new I wasn't going to be laid off. You know, a lot of this stuff is — you don't know what's going on at the time, nobody tells you you're going to be laid off, and after it all happened, it sort of made more sense to me what she was doing.

Q. Did she tell you she was taking away responsibilities from you to transition you for a layoff?

A. She did not tell me that, no.

Q. So that's just based upon your belief; is that right?

A. It's based on what happened to me, right.

Q. What's that belief based upon?

A. What happened to me.

Q. What do you mean by what happened to you?

A. I got laid off.

Appendix D

* * * [31]

Q. Back to this meeting you had with Jay Cole on or about February 19th of '03. I'm just using that as an approximate date, okay?

A. Right.

Q. What exactly did Jay Cole tell you in that meeting?

A. Well, we talked about the transition of our directorate. We were completely changing the way we were going to do business in the future. Okay. There was going to be one team that dealt with new programs coming into the directorate and the other three teams were going to be testing teams that would test the programs as they came in and get them out to production as quickly as we could. So it was a little bit different than the [32] way they were previously.

He told me that he liked what he saw when he saw me work for Janet. He also told me that he didn't think Janet gave me the leeway to do my job properly and that he would change that. He would give me more responsibility because he thought I could handle it.

Q. Did he offer you a job during that meeting on February 19th?

A. He didn't offer me a job. He just said that he would like to have me for this position. I told him I would put in for it and I asked him to talk to Mohammad about it.

Appendix D

Q. Do you know who was hired into the position that Jay Cole filled?

A. I just know it was a female, I don't know who. I was not there — I was not — you know, after I got laid off, I wasn't privy to any of that information.

* * *

[33] * * *

Q. When were you told that your employment was being severed by Sprint?

A. 26 February of 2003 about two o'clock in the afternoon.

Q. Was February 26, 2003, your last date worked at Sprint?

A. Yes, it was. They told me and marched me out the door after I worked three-quarters of the day.

* * *

[35] * * *

Q. Who told you that day your employment with the company was being separated?

A. Mohammad Hussain.

Appendix D

Q. Was anybody else with Mohammad when he told you your employment was being separated?

A. No.

Q. Then what did Mohammad tell you when he told you your employment would be separated?

A. He said that they were going through a transition and reorganization and that we were — they were going from four project managers to two and they were getting rid of two, is what they said, what he said.

Q. Do you have any reason to believe Mohammad wasn't telling you the truth at that [36] time?

A. No, I took that as the truth.

Q. Do you still believe Mohammad was being truthful with you when he told you that?

A. Well, I think he was truthful about that, but I don't think he was completely truthful when I asked him why I was being laid off. And I said, Is it based on any performance? He said, No, not at all. He said, Your performance has been great. We're just doing a reorganization and we're eliminating your position.

Appendix D

Q. Did you ask him any questions about his comments that your performance had been great?

A. He said it wasn't based on my performance, it was based on my position being eliminated and, you know, I didn't think I had much recourse to that at the time. I mean, you know, if he said, yeah, you've been a terrible worker, I would have really questioned him, but I didn't think I had any grounds to do that at the time.

* * *

[39] * * *

Q. Do you know if you were compared to other employees at the time of separation of employment?

A. Well, after the fact, I was told that I had been compared to other project managers and I was given an adverse rating after I left, which I didn't think was too fair.

Q. Do you know when the adverse rating was made?

A. I just know it was done after I was laid off and that Sprint had never given me a copy of it even though I've asked for it.

[40] Q. How do you know that the rating was given after you were laid off?

A. Well, I called HR, I asked if they had an adverse rating on me and they said, yes. So I mean, I assume it was done after I left because I never saw one when I was there.

Q. It's possible it could have been actually given — strike that. It's possible it could have been assigned to you before your separation of employment, you just had never received it; is that right?

A. I don't think so. In fact, Janet Mathus told me she was directed by Mohammad Hussain to give me an adverse rating. So I mean, I know it was directed and it wasn't given to me before I got laid off, so it must have been after that time.

Q. Why is it that you think that it must have been after that time?

A. Because we had a review of my 2003 performance at the end of the year and there was no mention of anything wrong with my performance. And if I was to have an adverse rating, then I would have thought she would have told me about it.

[41] Q. Do you know what the performance ratings were for the other three project managers in the certification directorate team?

A. I have no idea, but I was told that I was compared to one project manager that had already left the company. I didn't think that was too fair since she was a higher grade than I was in the first place. Very sharp gal. So I mean, I don't know what anybody else got.

* * *

Appendix D

[42] * * *

Q. So you did receive a rating in 2003 for your performance in 2002?

A. My initial — that's the first rating I ever received, then 2003 — I'm sorry, I'm getting my dates mixed up here. I did talk to Janet in December of 2002 and we had our final — we had a talk every quarter about the performance and I would identify my objectives and she would identify, you know, how she felt about my performance. That was done just prior to my leaving the company, and there was no talk about any adverse performance. In fact, when I spoke to her on the phone, she said my performance was not adverse at all and that she was forced to give me that rating.

Q. Did she tell you why she was forced to give you that rating?

A. She just told me that Mohammad Hussain directed her to rate me adversely. That's all she said.

Q. When was that phone conversation with Janet where she told you Mohammad had directed her [43] to give you a poor rating?

A. It was after I called Jay Cole to find out how I was doing for his job and he informed me that I was not being considered for his job, I was banned from the interview process because I had an adverse rating. That's the first I ever knew about it.

* * *

Appendix D

[75] * * *

Q. Mr. Borel, did you ever witness anyone being harassed at Sprint because of their age?

A. Well, yes, I have.

Q. Who was that?

A. Carol Kipps.

Q. How do you spell that?

A. K-I-P-P-S I think is the way to spell it. She was on the Tacordia team, Pat Baxter's team.

Q. Is that part of the certification directorate team?

A. Yes. The certification was made up of four teams, Janet Mathus, Pat Baxter's, Kim Dang [76] and Jay Cole's. So there are four teams under Mohammad Hussain.

Q. Did you witness anybody other than Carol Kipps being harassed because of their age?

A. I have no direct knowledge of that other than hearsay. It's probably just what you hear during like the ion reductions about the older folks going.

Q. Carol Kipps, how was she harassed because of her age while she was employed at Sprint?

Appendix D

A. Well, I actually talked to Carol after I got laid off and she said she was on medical leave and she had back problems, she came back to work and they laid her off when she got back.

Q. When was she laid off?

A. Prior to May. I don't know when.

* * *

[77] * * *

Q. How was Carol Kipps discriminated — strike that. How was Carol Kipps harassed because of her age?

A. Well, you know, I don't know any details. I just know that she had told me that, you know, when she got off her medical leave she got laid off the day she got back. And you know, I had heard rumors that she had given her an adverse evaluation and she confirmed that.

* * *

[78] * * *

Q. Did Ms. Kipps tell you she thought she had been terminated because of her age?

A. Yes.

Q. Did she tell you why she believed that?

A. She said she had 15 years with Sprint and she was doing a great job and she didn't know of any other reason she would be terminated. That's what she told me.

Q. Did Ms. Kipps tell you what her performance evaluation had been for 2002 performance year?

A. I don't think we talked about a specific year. She just said she — her performance was very good.

* * *

[79] * * *

Q. After that time have you talked with anybody at HR at Sprint about what you believe is age discrimination?

A. Well, I might have made a comment to — I remember her name now, Rene Latta, after I got my adverse evaluation, which I found out about after I got terminated. I was not happy. I was trying to find out from her where that evaluation was, if I could get a copy of it. I told her I thought that this is age discrimination because there's no reason for me to have been given an adverse rating.

* * *

Appendix D

[80] * * *

Q. I wasn't very clear in my question, I wanted to make sure we were on the same page. In your conversation with Renee Latta was the only time you had raised the concept of age discrimination with anyone at Sprint?

A. Yes, it was. I mean, I had no reason to think otherwise until I found out the real reason I was terminated.

Q. What do you believe the real reason was that you were terminated?

[81] A. Well, what I was told is that it was because my job was eliminated, but why would they give me an adverse rating if my job was eliminated if I'd done a good job. I think there had to be something else.

* * *

[89] * * *

When did you first contact the EEOC?

A. I can't give you a date. I just know it was within six months I think after my termination.

Q. All the information you gave to the EEOC, was that truthful?

A. Whatever I've given has been truthful.

Appendix D

Q. Are you aware of other individuals at Sprint who have raised claims alleging age discrimination?

A. I know there are a lot of people that have. I don't know specifically names other than Carol Kipps.

Q. Anyone else?

A. Well, I know there's a number of them involved in this class action.

* * *

[90] * * *

Q. Mr. Borel, you've been identified as a witness who has knowledge of allegations of widespread age discrimination at Sprint. Were you aware of that?

A. I know I was identified, yes.

Q. What is the widespread age discrimination at Sprint that you're aware of?

A. Well, personally dealing with myself and Carol Kipps, I mean, I've heard about other folks, but I don't know their details.

* * *

Appendix D

[91] * * *

Q. Were you aware that you were identified as an individual who has knowledge of Sprint's treatment and opinions toward its older employees?

A. I believe so.

Q. What is your knowledge about Sprint's treatment and opinions towards older employees?

A. Well, talking about me personally, Carol Kipps, those are the only two situations, Darryl Miller I guess since he was involved, but it's a little different with Darryl. I was told that he had integrity situation which he did not know of, so there's something funny with Darryl as well.

[92] Q. So there's something funny with Darryl and Carol Kipps told you she thought she had been subjected to age discrimination and you have your own beliefs about being discriminated against; is that right?

A. Yes, I do.

Q. Are you aware of anything else regarding Sprint's treatments of its older employees?

A. Not that I have personal knowledge of, no.

Q. Anything that's hearsay?

A. Yeah, there are a lot of people that feel that way.

Q. How are you aware of that?

A. From hearsay.

Q. From whom did you hear that from?

A. I mean, after I got laid off, you know, trying to talk around a little bit, and there are a lot of people that seemed to be released that have been over 50.

* * *

[93] * * *

Q. (By Mr. Hulla) Lastly you've been identified as an individual who has knowledge of transferring and hiring of younger individuals in full-time positions that older individuals are qualified to perform?

A. That's correct.

Q. Other than you own personal circumstances, Darryl Miller's and Carol Kipps', [94] are you aware of other individuals?

A. No. Just my situation where Deanna Patton was moved in to take over my job after I left.

Appendix D

Q. What's Deanna's age?

A. I don't know what her age is. She is probably — I don't know what her age is. I mean, like I said before, we didn't talk about ages of people. She could be in her thirties, she could be 40 for all I know.

Q. You say she assumed your responsibilities?

A. After the fact I found out she did.

Q. And do you know what Deanna Patton's performance ratings were for 2002?

A. Well, all I know is that she was displaced from a team that got laid off and she was put in a position that later took my job. So I don't have any idea about performance ratings.

* * *

[95] * * *

Q. Okay. And do you think any of Sprint's practices are discriminatory against individuals because of their age?

A. Well, as far as I'm concerned, the practice of what I went through about being told that you're being laid off because your job was being abolished and then find out later that you've got an adverse rating that prohibits you from working any place in Sprint or interviewing for a job, I think that's discriminatory.

Appendix D

[96] Q. That's because of your age?

A. I think so.

Q. Why do you think so?

A. Because I'm a damn good project manager. And I think I could do the job of anybody in that STIC Lab, you know, and I don't think there's a reason why I should have been terminated.

Q. Mr. Borel, you filed your own lawsuit against Sprint; is that correct?

A. Yes, I did.

Q. And in that lawsuit you allege you were discriminated against because of your age; is that right?

A. That's right.

* * * *

APPENDIX E — EXCERPTS FROM DEPOSITION OF YVONNE WOOD DATED APRIL 23, 2004

ELLEN J. MENDELSOHN vs.

SPRINT/UNITED MANAGEMENT COMPANY

DEPOSITION OF YVONNE WOOD

APRIL 22, 2004

[Commencing at page 5]

* * *

Q. What is your date of birth?

A. November 7, 1951.

Q. As we sit here today you are fifty-two years old; is that correct?

A. Yes.

* * *

[8] Q. When did you begin working at Sprint?

A. November 4th, 1996.

* * *

Appendix E

[19] * * *

Q. Do you know, did you work for a [20] particular division of Sprint such as the LTD, PCS or GMG organization?

A. PCS.

Q. While you were employed at Sprint did you work at any other business unit other than Sprint PCS?

A. When we got purchased I guess I worked for Sprint.

Q. But you continued to work under the name of PCS after the time of the purchase?

A. Yes. It was known as a different organization when I first started, but I'm not sure what it was anymore.

Q. At some point in time it was incorporated into Sprint Corporation as far as you know; is that correct?

A. That's correct.

Q. You continued to be identified with the PCS part of Sprint organization; is that correct?

A. That's correct.

Q. Did you ever work for any part of the Sprint organization other than PCS?

A. I'm not sure if when they bought us if it was considered — they were moving things together and things were kind of chaotic.

[21] Q. Other than the point in time that you were bought, do you remember having worked for any part of Sprint other than PCS?

A. No.

Q. How long did you work in the role as a database analyst II?

A. Maybe six months, a year.

Q. What was your role after you were database analyst II?

A. Database analyst — no, data analyst III.

Q. When were you given the title data analyst III?

A. Approximately 1998, maybe 1999, at the latest.

Q. Was it a promotion from database analyst II to data analyst III?

A. Yes. And it was data analyst II, I believe.

Appendix E

Q. While you were employed by Sprint, did you receive any promotions other than your promotion from a data analyst II to data analyst III?

A. No.

* * *

[22] * * *

Q. What was your job grade as a data analyst III?

A. 77.

Q. Was your job grade while you were employed at Sprint ever higher than a 77?

A. No.

* * *

[39] * * *

Q. When were you told of your separation of employment at Sprint?

A. January 15th.

Q. What year was that?

A. 2003.

Appendix E

Q. Were you required to come into the office and do any work after January 15th?

A. No.

Q. Who told you that your employment with Sprint was being separated?

A. I actually knew it was happening the day before, but it wasn't official.

Q. How did you know that?

A. Someone leaked it to me.

Q. How did they leak it to you?

[40] A. They told me that I was going to be laid off the next day.

Q. Who was it that told you?

A. My supervisor.

Q. Roberta King?

A. Yes.

Q. Who told you on January 15th, 2003 that you were going to be separated from employment at Sprint?

A. Ted Stock. Ted Stock also told me on the 14th.

* * *

Appendix E

[42] * * *

Q. At any time on January 14th did you tell [43] Roberta King you thought your separation from employment was because of your age?

A. I didn't say that, but — I didn't vocalize that.

Q. But on January 14th you thought that was the reason?

A. I thought it was a combination of factors: my disability, the fact that I was a woman, and my age.

* * *

[47] * * *

Q. Do you know what factors were considered [48] at the time management decided who to separate?

A. There was never a formal announcement that said specifically what factors were to be considered.

Q. Do you know what factors were considered?

A. I can only make assumptions.

Q. What would those assumptions be based upon?

A. Age, race, sex, disability.

Appendix E

Q. Earlier you had indicated age, sex, and disability, now you also believe it included your race?

A. Not mine. Others.

Q. Why is it that you believe age, race, sex and disability were factors considered as far as who was to be part of a reduction in force in your group?

A. That's a complicated question.

Q. Why is it?

A. I had a copy of a spreadsheet I had received from one of the supervisors accidentally. This spreadsheet indicated age, race, and sex.

Q. Who was the supervisor that you received that from?

A. Dan Kennedy.

[49] Q. Who did Dan report to?

A. Ted Stock.

Q. Do you know if those factors were considered by Mr. Kennedy when he made termination decisions?

A. Yes.

Q. Why is that?

A. Because I have the spreadsheet.

Q. Do you know if he referred to the spreadsheet when he made those decisions?

A. I would believe so.

Q. Do you know when that spreadsheet was created?

A. March of 2002.

Q. Do you know who it was created by?

A. There was a name on the spreadsheet, I think it was Dean Hart.

Q. Do you know who Mr. Dean Hart is?

A. No.

Q. Do you know if Mr. Dean Hart populated the spreadsheet that you received?

A. I believe it was populated by a database.

Q. In order to populate it from a database you would have to enter some information on the spreadsheet; is that right?

[50] A. Yes.

Q. Do you know who entered that information onto the spreadsheet to populate it from the database?

A. I didn't actually see them doing it so I can't say.

Q. Do you know when the information was added to the spreadsheet to pull information from the database?

A. I don't know how often it was used.

Q. Do you know when it was?

A. I know that there were people's names on it and that it was accidentally sent to me, that's what I know.

Q. Do you know if the RIF selection sheet was prepared before or after the decisions were made as to whose employment would be separated as part of the RIF?

A. Before.

Q. How do you know that?

A. Because the people's names who were on the sheet, some of the people were no longer employed there, and their names were highlighted in pink or red as to going to be let go.

Q. Do you know the date on which the [51] information was added to the spreadsheet?

A. Not specifically.

Q. So it could have been after the decisions were made as to who was selected for the RIF; is that right?

A. It was before, because they weren't let go until after I had seen the spreadsheet, the ones on that specific round.

Q. But do you know when the decisions were made to terminate individuals' employment?

A. No, I do not.

Q. You don't know what date that spreadsheet was populated; is that correct?

A. Correct.

Q. You're assuming that the spreadsheet was created before the decisions were made?

A. I know the spreadsheet was created before the decisions were made.

Q. How is it that you know?

A. Because I received it in an e-mail and it had the people's names on it, some of the people's names on it.

* * *

Appendix E

[71] * * *

Q. Ms. Wood, while you were employed by Sprint did you ever witness anything that you would consider to be harassment because of an employee's age?

A. Yes.

Q. What was that?

A. I was told as opposed to witness, that Ted Stock had said that Sharon Miller's group was a bunch of old, sick people, basically.

Q. Was there anything that you witnessed that you believe constituted harassment because of employees' ages?

[72] A. Yes.

Q. What was that?

A. They brought in an intern and he was going to be doing my job. They brought him in just before Mark Kragen was laid off.

Q. Anything else?

A. They sent him to DC to be trained for my job and would not give me training.

Q. Is there anything else that you witnessed that you believe constituted harassment because of employees' ages?

A. Offhand, I can't think of anything right now.

Q. Who was the intern who was brought in, as you say, to do your job?

A. Cory House.

Q. Was his assignment temporary; do you know?

A. Yes, but Maureen had told me that they were going to try to bring him on permanently to do my job, if he wanted to do it.

Q. Do you know if he was ever brought on permanently to do your job?

A. He didn't want to do it.

Q. How do you know that?

[73] A. He told me. He hated it.

Q. Do you know if a job offer was ever made to Cory House?

A. Not in — I don't know. I know he was still working at Sprint when I left.

Q. Do you know if he is still working at Sprint now?

A. I have no idea.

Q. Do you know the terms for his internship to at Sprint?

A. No, I do not. They referred to him as one of Jerry's kids, though.

Q. Why was that?

A. Because he was brought in under some program that Jerry Batt had initiated.

Q. What program is that?

A. I don't know the name of it.

Q. Do you know who else participated in that program?

A. No, I don't.

Q. Do you know the ages of the people who participated in that program?

A. My understanding is that they were interns and young, fresh out of college, pretty much.

[74] Q. Do you know what their ages were?

A. No.

Q. I believe you said Cory House was given training that you had not been given; is that correct?

A. Correct.

Q. What kind of training was that?

A. Case tool training for the latest version of the tool.

Q. You didn't want to do case tool training; is that right?

A. No, I did not. But I did want training if I had to stay in the position.

Q. About a month before your separation you were released of your case tool administrative work; is that right?

A. No, actually I was doing both positions, both case tool and working with data in-house.

Q. You were never released of your case tool administrative work?

A. No.

Q. Do you know if the training that was given to Cory House was part of the terms of his internship at Sprint?

A. No, I do not.

[75] Q. Do you know who continued to do the case tool administrative work following your separation of employment?

A. I heard it was done by committee.

Q. Do you know who was on that committee?

A. No, I don't.

Q. I believe you indicated that you had been told that Ted Stock had made a comment to the effect that Sharon Miller's group was a bunch of old, sick people; is that correct?

A. Yes.

Q. When were you told that?

A. It was around the time I was having physical therapy and I believe it was — I believe around 2001.

Q. And you were reporting to Sharon Miller at the time?

A. Yes.

Q. Do you recall why Sharon Miller told you that?

A. Because I think it was relevant to the fact that I had had to have the physical therapy and take time off from work in order to go do that. And I think that was — may have been his reaction to the news.

[76] Q. Do you know for sure if that was what his intention was when he made that comment?

A. No, I don't.

Q. Do you know if Sharon Miller told anyone else that Ted Stock had made a comment to the effect that her group was a bunch old and sick people?

A. I know she told Carolyn Selberg.

Q. How do you know that?

A. Carolyn told me.

Q. Did Sharon Miller tell you when Ted Stock made this comment?

A. It was around the time she told me.

Q. Did Sharon Miller tell you if anybody else overheard Ted Stock's comments about Sharon Miller's group being a bunch of old, sick people?

A. No, she didn't tell me.

[77] * * *

Q. Ms. Wood, earlier you testified that you had received a worksheet from a man named Dan Kennedy; is that correct?

A. That's correct.

Q. When did you receive that worksheet?

A. Approximately January 6th, 2003.

Q. Did you ever ask Dan Kennedy why he sent you that worksheet?

A. He came in and told me he sent it to me by accident.

Q. Did Dan tell you anything else about the worksheet that he sent you on January 6th?

A. I believe he said it was for Tom Woodard.

Q. What was Tom Woodard's position at the company?

A. He was another manager, supervisor in our group.

Q. Did he say why he was sending it to Mr. Woodard?

A. No.

Q. Can you describe for me exactly what was [78] on the spreadsheet that Mr. Kennedy sent to you on January 6th?

A. There were several people's names, comments about the people, their address, phone number, Social Security number. There were places on the spreadsheet for age, race, and sex, meaning birth date, education, places for the people's ratings for previous years, things like that.

Q. Again, Dan Kennedy never told you what the purpose of that spreadsheet was; is that correct?

A. He did not tell me.

Q. Did you ever ask anybody at Sprint what the purpose of that spreadsheet was?

A. I believe it is titled something about layoffs and RIFs, or something like that, so it was pretty obvious.

* * *

[104] * * *

Q. Are you aware that other individuals at Sprint have raised complaints of age discrimination?

A. Yes.

Q. How are you aware of that?

A. There was a lot of grumbling when I was there, and I also know that through litigation, I've been made aware of that.

Q. Who were you aware of that made complaints of age discrimination?

A. The litigants.

Q. Who are they?

A. I don't know all of them. I know Ms. Mendelsohn.

[105] Q. Anyone else?

A. Sharon Miller.

Q. Anyone else?

A. I think Shirley Williams.

Q. Anyone else?

A. I know that people have signed on to be in the lawsuit, too.

Q. Do you know who those people are?

A. Not all of them.

Q. When you say lawsuit, are you talking about a lawsuit that you filed against Sprint alleging age discrimination?

A. Myself and others.

* * *

[109] * * *

Q. How about Sharon Miller; how are you aware that she had raised complaints of age discrimination?

[110] A. She told me.

Q. When did you and Sharon Miller talk about her complaints of age discrimination?

A. I don't recall the exact time. It was after she was laid off.

Q. When was she laid off?

A. I don't know exactly.

Q. That was after you; is that right?

A. I don't know.

Q. What did you and Sharon Miller talk about with regard to her complaints of age discrimination?

A. Just that we felt we had been discriminated against.

* * *

[112] * * *

Q. Was anything else at Sprint, other than your separation of employment, the product of age discrimination?

A. I think it was a collection of things, a combination.

Q. I'm probably not asking the question very clear. In your lawsuit you allege you were discriminated against because of your age; is that correct?

A. Yes.

Q. Why is it you were discriminated against because of your age?

A. Because there were people who were younger than I, with less education, retained by Sprint when I was let go.

Q. Who were those people?

A. There were numerous people.

Q. Who are they?

A. I know Sharna Bean.

Q. What was her last name?

A. Bean. B-E-A-N. Marita Johnson, Cindy [113] Johnson, Chris Reille. There were a lot of people left.

Q. Anyone else?

A. Not that I can remember at this time, the names. I know there were, though.

Q. Do you know what Sharna Bean's performance rating was for the 2002 performance year?

A. No, I have no idea.

Q. Do you know how any of the employees who were left behind were rated?

A. No idea.

Q. When I say left behind, those individuals who were not separated; is that what you understood?

A. That is what I understood.

Appendix E

Q. Anything other than the fact that younger employees retained their employment after the RIF that led you to believe that your termination from employment was discriminatory?

A. Ted Stock's comment, of course.

Q. That was at some point in 2001; is that right?

A. I believe so.

* * *

[115] * * *

Q. Is there any reason, other than the fact that you think younger males were promoted, that forms a basis for your belief that you were not promoted because of your age?

A. The intern program where they brought in all the young kids. They were supposed to be on the management fast track.

Q. Who were they?

[116] A. I know of Cory House for certain, but I don't know other names.

Q. Cory House's position was temporary, right, temporary internship?

A. In my group, supposedly.

Appendix E

Q. Why do you say supposedly?

A. Because they had told him that he — if he wanted to, he could have my job.

Q. Were you aware of anybody else who was in an intern program who was under the age of forty?

A. I knew that there were supposedly a fairly large group of people brought in for this, the Jerry's kid thing.

* * * *

APPENDIX F — EXCERPTS FROM DEPOSITION OF SHARON MILLER DATED APRIL 23, 2004

ELLEN J. MENDELSOHN vs.

SPRINT/UNITED MANAGEMENT COMPANY

DEPOSITION OF SHARON MILLER

APRIL 23, 2004

[Commencing at page 6]

* * *

Q. What is your date of birth, Ms. Miller?

A. April 22nd, 1950.

Q. So you're 54 and one day old?

A. Yes.

* * *

[8] * * *

Q. Mrs. Miller, when did you first become employed by Sprint?

A. March 1st of 1990.

Q. And what was your position at the time you were hired by Sprint on March 1st of 1990?

A. I was a senior analyst, senior quality [9] analyst.

Appendix F

Q. For how long a period of time were you a senior analyst — strike that. How long time were you a senior quality analyst at Sprint?

A. For about not quite a year.

Q. Were you promoted from your senior quality analyst position?

A. Yes, I was.

Q. What position were you promoted to?

A. Manager.

Q. How long were you in your manager position?

A. For the duration of that term with Sprint until October of 1993.

Q. So you were employed by Sprint from March 1st of 1990 to October of 1993; is that correct?

A. Correct.

Q. Why did your employment terminate in October of 1993?

A. I chose to leave full-time employment to home-school my youngest son and do part-time work instead.

Q. So it was your decision to terminate your employment in October of 1993?

A. Yes. There actually was a layoff action [10] at that time and I volunteered into that.

Q. Did you receive severance as a result of volunteering to take layoff in October of 1993?

A. Yes, I did.

Q. When did you begin working again after October of 1993?

A. I actually continued working part time on contract to Sprint. That started I believe in — actually in December, very shortly after I had left.

Q. So you took — there was about two months between the time that you separated your employment in October 1993 and when you began a part-time position as a contractor for Sprint?

A. About that, yes.

Q. And in December of — strike that. In December of 1993 when you were working for Sprint as a contractor, were you working through a contracting agency?

A. No, I was working as an independent contractor.

Appendix F

Q. Did you send invoices to Sprint directly or did somebody send them to Sprint on your behalf?

A. I sent them.

[11] Q. How long did you work in your part-time capacity as a contractor for Sprint?

A. Until April of 1996.

Q. Where did you work as of April of 1996?

A. Trying to recall. I did some additional part-time work independently as a contractor for Universal Underwriters that overlapped actually with my Sprint contracting.

Q. You began providing services to Universal Underwriters in April of 1996?

A. Actually, I began providing services to them in about January of that year, I was doing both.

* * *

[18] * * *

Q. And while you were a consultant managing projects at Sprint for Ultreya, were you providing services to a particular business unit or division of Sprint?

A. Sprint PCS.

Appendix F

Q. Did you ever provide services as a consultant for Ultreya to any other business unit other than PCS?

A. No.

Q. And how much money were you making as a consultant for Ultreya?

A. My rate varied during that three-year period of time from $75 an hour to $90 an hour.

Q. When you say "rate," is that what you charged Ultreya for your services?

A. That's what Ultreya paid me, yes.

Q. You were paid by the hour by Ultreya?

A. That's correct.

Q. When did you begin working at Sprint as an employee again after Ultreya?

A. In October of 2002. I believe it was effective the first of October.

* * *

Appendix F

[20] * * *

Q. Why did you list Ted Stock as a reference in your employment application?

A. He was the director that I was working for when I was brought in as a consultant.

Q. Did you expect Mr. Stock to give positive feedback regarding your performance as a consultant?

A. Yes, I did.

* * *

[25] * * *

Q. Why were you not comfortable accepting a position in the data management department?

A. I felt that the scope was a little more narrow than what I like to do and kind of didn't want to be slotted into that narrow of a job.

Q. Any other reason why you didn't feel comfortable taking the position in the data management department?

A. I was not totally comfortable with Mr. Stock's approach to management.

Q. Why is that?

A. I didn't feel that he was always fair with people.

Q. Why is that?

A. Just actions that he had taken and I'd observed and comments that he had made.

Q. What kind of actions had you observed?

A. I felt that his tendency was to be less than objective I would say on a professional level with people. I felt that he made personal decisions about whether or not he liked someone rather than how they were performing.

Q. What led you to believe — strike that. [26] What led you to believe that he was making personal decisions about his folks as opposed to looking at their individual performance?

A. Comments that he made to me directly.

Q. What were those comments?

A. I guess an example would be his comment that he felt he had too many older people and ailing people, old, sick people in his department.

Q. Were there any other examples?

A. Well, there were numerous discussions and numerous comments made in that direction.

Appendix F

Q. Well, what were those discussions, comments?

A. All of them?

Q. Yes. I would like to know about all of them, please.

A. I don't know that I can recall every single circumstance. One very specific situation was with an employee on my team who had had to take time off due to an accident, an injury, and I was given instructions to once he returned to work, build a case against him so that Mr. Stock would have evidence to fire him.

Q. Are there any other circumstances that you can recall other than Mr. Stock telling you to [27] build a case against another employee and making comments to the effect he had too many older and sick employees in his department?

A. He frequently made references about his concerns about a couple of other employees as well as who had medical issues and who were older and made comments about waiting for layoffs to secure so that he could clean up his department.

Q. Anything else?

A. I think that's pretty much -- you know, it's generally --

Q. Specifically can you recall any other comments or discussions that you thought were inappropriate?

A. I don't recall any at the moment. There were a number of discussions. It seemed to be his general attitude, so there

were a number of times that there were those type of comments made.

Q. As we sit here today, you can't remember any of those other comments other than the ones you've already testified about; is that correct?

A. Not right off the top of my head, no.

Q. Do you need to take a few minutes to think about it? Would that help?

A. If you would like.

[28] Q. Why don't we take a couple minute break.

A. Okay.

Q. Let me know when you think you've had enough time.

(Recess.)

A. I do recall there was an older gentleman that we had taken on in a contract position and we were looking to — Ted was looking to fill that position permanently and several people including myself felt that this gentleman would be a good fit for that position based on the performance he demonstrated while he was on contract, and Ted made the comment that he would like to see someone a little younger in that job.

Appendix F

Q. (By Mr. Hulla) Anything else that you can remember?

A. I recall another comment that he made about one of the other managers on the same level as myself when he had to have some — he had a medical problem come up. And I don't remember his exact words, but it was a derogatory comment about how he guessed he couldn't depend on him either, something to that effect.

Q. Anything else?

A. Not that I can think of at the moment,

* * *

[29] * * *

Q. You mentioned that you heard Ted Stock made comments to the effect that he had too many older, sick employees in his department; is that [30] correct?

A. He said those things directly to me.

Q. Was anyone else present when he said those things to you?

A. Not that I recall.

Q. Do you know who he was referring to when he said he had too many older, sick employees in his department?

A. I know that he personally referred to a gentleman by the name of Mark Craigin. He personally referred to Carolyn Selberg, to Yvonne Wood.

Q. Anyone else?

A. There's another gentleman in the department, but he was a contract employee and I can't remember his name.

Q. When you say "he referred to them," do you mean in the context of this comment that he said he had too many older, sick employees in his department?

A. He specifically used them as examples.

Q. When did Mr. Stock make this comment to the effect he had too many older, sick employees in his department?

A. What date, time?

[31] Q. Yes.

A. I can't give a date and time. It was a frequent conversation, a frequently expressed concern.

Q. Do you remember when he first raised that concern?

A. No, I don't.

Q. Recall when he would have first -- I'm not going to ask you about a specific date. I understand you don't recall a specific date; is that correct?

A. That's correct.

Q. Do you remember a general time frame when he made those comments?

A. When I first went to work in his department, I was not reporting directly to him. I was reporting to a senior manager for him. And about a year into the engagement Ted reorganized his staff and had me reporting directly to him in a senior manager capacity. So it would have been shortly after that period of time.

Q. Do you know when that was?

A. It would have been around the first part of 2001.

Q. Do you know how long -- strike that. Do [32] you know over what period of time Mr. Stock made these comments to you?

A. For about not quite a year.

Q. On how many occasions did Mr. Stock make comments to the effect he had too many old, sick employees in his department?

A. I can only say frequently. I couldn't give you a number, but . . .

Q. You're not sure how many times he said it?

A. It was a frequent concern that he expressed. I couldn't put a number to it. I don't think I could be that precise.

Q. Do you know what frequency it was that he made those comments?

A. I would just guess that it would be at least a couple of times a month.

Q. Did Ted Stock ever tell you why he was telling you these things?

A. Why?

Q. Yes.

A. He made comments about having pressure to get things done and being concerned that his work force couldn't perform in the capacity that he was happy with. So I'm assuming that it was — he [33] felt that that was something that impacted his ability to perform as he was expected to.

Q. Do you know if anyone overheard your conversations with Mr. Stock to the effect he had too many old and sick employees in his department?

A. I don't know if anyone overheard that, no.

Q. Do you know if Mr. Stock told anyone else that he felt he had too many old and sick employees in his department?

A. Yes.

Q. Who is that?

A. David Allen is one of his senior managers. Mark Sander who was another one of his senior managers. Jan Richter is another one of his senior managers. It was discussed among us that he had made those comments.

Q. Did you ever raise concerns that you had about Ted Stock making such comments to anyone at Sprint?

A. Did I raise those concerns to someone else at Sprint?

Q. Yes.

A. Other people at my peer level in casual discussion. I was under contract at the time, so [34] I was always careful about the kind of comments that I made about anyone.

* * *

[41] * * *

Q. You mentioned an individual who had been off of work because he or she had been involved in an accident; is that correct?

A. That's correct.

Q. Who was that?

A. Mark Craigin.

Q. And I believe it's your testimony that to the effect that Ted Stock asked to build a case against Mark; is that right?

A. Yes, he did.

Appendix F

Q. When did Ted Stock ask you to build a case against Mark Craigin?

A. After Mark had returned to work.

Q. Do you know what time frame that was?

A. I don't remember the dates.

Q. Do you recall a general time frame?

A. It must have been the latter part of 2001.

Q. You were still in the position as a contractor for Sprint; is that correct?

A. Yes.

* * *

[45] * * *

Q. Did you raise any objections about Ted Stock's request to build a case against Mark Craigin to anyone else?

A. No.

Q. Why is that?

A. Because I was under contract and I felt that it would be detrimental to my position.

Q. Any other reason?

A. No.

Q. Did anyone else -- strike that. Was anyone else present when Ted Stock asked you to build a case against Mark Craigin?

A. No.

Q. How many times did Ted Stock ask you to build a case against Mark Craigin?

A. There was one meeting that we had that he gave me instruction on what he wanted me to do. We had numerous conversations and follow-up about [46] how that was going.

* * *

Q. Did you tell anyone other than Mr. Stock about Mr. Stock's request that you build a case against Mark Craigin?

A. I discussed it with David Allen, discussed my concern about it with David.

Q. What did you and David talk about?

A. Just general, you know, peer conversation about we don't agree with the boss' position on this, but you know, you got to do what you got to do. You got to do what you're told to do.

Q. Do you recall when you spoke to David Allen about the fact that Ted Stock asked you to build a case against Mark Craigin?

[47] A. Just that it was in that same time frame shortly after it occurred.

Q. I believe you said Mr. Stock frequently made references to the effect he had concerns about older employees and employees with medical issues; is that correct?

A. That's correct.

Q. And that he was waiting for layoffs to arise so that he could clean up your department I think were your words; is that right?

A. Yes, that's accurate.

Q. And when did he make those comments, do you know?

A. During the period of time that I was reporting directly to him.

Q. And were others around when he made those comments?

A. I don't recall.

Q. Did you ever discuss the comments that Ted Stock made by wanting to clean up his department with anyone else?

A. The other managers in the department.

Q. Again, that's Jan Richter, Mark Sander and David Allen; is that right?

A. That's correct.

[48] Q. Anyone else?

A. As I mentioned, I mentioned my concern about that to Cloene Davis.

Q. What was Cloene's response?

A. As I mentioned, she was a little defensive of him, you know protective of him.

* * *

[49] * * *

Q. Did you ever ask Cloene Davis to follow up on your concerns about Ted Stock —

A. No.

Q. — and comments he was making? Why was that?

A. I trusted her judgment about it, about the situation.

Q. What do you mean that you trusted her judgment?

A. I gave her the information. She was a vice president, I didn't figure it was my — I didn't feel that it was my place

to give her instructions about what to do with that information.

Q. So you didn't accept this job in Ted Stock's department; right?

A. That's correct, I did not.

Q. You ultimately accepted a tech specialist position in October of 2002; is that right?

A. That's correct.

[50] Q. Who did you report to at that time?

A. To Cloene Davis.

Q. I believe you mentioned there was a contractor who was looking to — strike that. I believe you said that there was a contractor who was in a position and the company was looking to fill that position on a more permanent basis; is that correct?

A. That's correct.

Q. Who was that?

A. Chuck Jones.

Q. What was Chuck's age?

A. He was 55, early fifties.

Q. Do you know what Carolyn Selberg's age is?

A. I don't specifically know her age. I know that she is a little older than I am. She's probably in her mid fifties.

Q. Do you know what Yvonne Wood's age?

A. Yvonne is in her late forties I believe.

Q. Do you know Mark Craigin's age?

A. I think Mark was just a year or two younger than I am. He would be in his late forties, early fifties.

Q. This position that Chuck Jones had as a [51] contractor, was the idea to take that position and make it more permanent?

A. Yes.

Q. So the duties that Chuck Jones was performing would have been the same duties as the more permanent position; is that correct?

A. That's correct.

Q. Do you know who made the hiring decision for that position?

A. Ted.

Q. Who was hired into that role, do you know?

A. No, I don't.

* * *

[52] * * *

Q. But Chuck wasn't ultimately hired into that role; is that right?

[53] A. He was not.

Q. Do you know if Sprint interviewed anyone else for the position Chuck Jones had?

A. I do not know, I'm not —

Q. I believe you indicated Ted Stock didn't want to hire Chuck Jones; is that right?

A. That's correct.

Q. And I think you indicated that it was because he wanted someone younger; is that right?

A. That was the comment that he made.

Q. When did he make that comment?

A. When we talked. Actually myself and Mark Sander both talked to Ted about making Chuck permanent and

wanted to give him an offer and Ted kept expressing reluctance to do that. And in a conversation that I had with Ted about his reluctance and timing, you know, Is this someone you don't want to hire or is this just a timing issue, he asked the question or expressed the concern of can't we find someone who's younger and just more qualified or just as qualified or some — can we take a look at some other younger candidates.

* * *

[58] * * *

Q. I think we've talked about five separate topics. I want to go through them just to make sure that we've covered them all, see if there's anything that you can think of now that we haven't talked about so that we haven't missed anything. Okay.

A. Okay.

Q. We've talked about Ted Stock making comments to the effect he had too many older, sick employees in his department; is that right?

A. That's correct.

Q. We talked about Mark Craigin and his disability and the instructions from Ted Stock to the effect that he wanted you to build a case against him; is that right?

A. That's correct.

Appendix F

[59] Q. We also talked about the fact that Ted Stock frequently made references regarding concerns about other employees of medical issues and who are older and that he would have the opportunity with layoffs to clean up his department; is that right?

A. Yes.

Q. We talked about Chuck Jones and Ted Stock's desire to hire somebody younger into that position; is that right?

A. Yes.

* * *

Q. Do you know if Mark Craigin was ever terminated from employment at Sprint?

A. I believe that he was. I know that — well, I don't know, but I don't believe he is with [60] Sprint anymore.

Q. Do you know why he's not with Sprint anymore?

A. No, I don't.

Q. In October of 2002 you were hired into a tech specialist position reporting directly to Cloene Davis; is that right?

A. That's correct.

Q. What was your job grade as a tech specialist?

A. Seventy-nine.

Q. At any point in time while you worked for Sprint as an employee after October of 2002, did your job title change from anything other than a tech specialist?

A. No.

Q. Did your job grade change?

A. No.

Q. What were the responsibilities of your function as a tech specialist?

A. My responsibilities were to provide coaching and mentoring to Cloene's directors, in conjunction with Jerry Batt, the CIO's quality improvement plan, quality improvement program, and to organize efforts across her organization to [61] facilitate the implementation of changes in operations, methodologies, techniques to improve operations.

* * *

[87] Q. That was my fault. When were you told you were separated from employment at Sprint?

A. I believe the date was November 21st.

Q. Who told you?

Appendix F

A. Mike Carey.

Q. What did Mike tell you?

A. I was called into a meeting with Mike and one of his managers. I was given my separation documents and explained that I was part of the RIF that was occurring and given an overview on what my separation benefits would be, and then I was escorted out.

Q. Do you know if others had been told earlier in the day on November 21st that they were going to be subjected to a reduction in force and separated?

A. I know that, yes, other people were. I don't recall specifically who they were, but I do know that it was an ongoing thing for two or three days there.

Q. At the time that you had your meeting with Mike Carey, were you aware that other individuals were being separated from their employment at Sprint because of a RIF?

A. Yes.

* * * *

APPENDIX G — EXCERPTS FROM DEPOSITION OF BONNIE L. HOOPES DATED APRIL 23, 2004

ELLEN J. MENDELSOHN vs.

SPRINT/UNITED MANAGEMENT COMPANY

DEPOSITION OF BONNIE L. HOOPES

APRIL 24, 2004

[Commencing at page 5]

* * *

Q. Who lives with you at that address?

A. My husband.

Q. What is his name?

A. John.

Q. Anyone else?

A. No.

Q. Do you own any homes other than your home on 1927 Goodman?

A. No.

Q. What is your date of birth?

A. July 3rd, 1955.

Q. So you're 48 years old?

A. Yes.

* * *

[8] * * *

Q. Mrs. Hoopes, how long did you work for Sprint/ United Management Company?

A. Seventeen years.

* * *

[10] * * *

Q. When did you begin working at Sprint?

A. My original date of hire was in 1984.

Q. What was your age at that time?

A. Twenty-nine.

Q. You said your original hire date. Did you have a break in service while you were employed by Sprint?

A. Yes.

Q. What was your original position when you started with Sprint in 1984?

Appendix G

A. Business office coordinator.

Q. Where was that office located?

A. On Lowell in Overland Park.

Q. How long were you in the role as business office coordinator?

A. Approximately three months.

Q. Were you promoted at that time?

A. Yes.

Q. And what position were you promoted to?

A. Systems support supervisor.

Q. How long were you in the role of assistant support supervisor?

A. Until the merger in 1986.

[11] Q. When you say "the merger," you're talking about the merger with GTE?

A. Yes.

Q. That was between United Telecom and GTE?

A. Yes.

* * *

Appendix G

[18] * * *

Q. You were laid off as a program support manager, is that correct, in 1995?

A. Yes.

Q. Why were you laid off as a program support manager in 1995?

A. That's when the marketing department moved to Dallas.

Q. Do you know what your age was at the time?

A. Forty.

Q. Again, you were offered the opportunity to relocate to Dallas in 1995 and you did not; is that right?

A. That's correct.

Q. Did you have a break in service after you were laid off in 1995?

A. Yes I did.

* * *

Appendix G

[20] * * *

Q. So you initiated contact with Sprint to see if you could be employed there; is that right?

A. That's correct.

Q. You accepted an offer of employment from Sprint following your employment with QVC?

A. Yes.

Q. When was that?

A. March of '97.

Q. What was your age at that time, do you know?

A. Forty-two.

Q. When you were rehired by Sprint in March of 1997, what location did you work for Sprint at?

A. I believe the address was 7330 West 119th Street. No, College Boulevard.

Q. Was that in Overland Park, Kansas?

A. Yes.

* * *

Appendix G

[21] Q. And what position were you rehired into in March of '97?

A. Quality manager.

Q. How long did you hold the position of quality manager at Sprint?

A. Approximately two years.

Q. So at some point in time in 1999?

A. Yes.

Q. What was your next role at Sprint following your role as a quality manager?

A. Program manager for Y2K.

Q. And was the change in jobs from quality manager to program manager in Y2K a promotion?

A. No.

Q. Was it a demotion?

A. Yes.

Q. Your age at that time would have been 44 years old; is that right?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Were you given any awards for your role in Sprint's Y2K compliance efforts?

A. Yes, I was.

Q. What award was that?

[22] A. The Sprint Values Excellence Award.

Q. Is that an individual award or team award?

A. It was for our team.

* * *

[23] * * *

Q. Was the senior manager of strategic initiatives the last position you held at Sprint?

A. Yes.

Q. What location did you work from as a project manager of Y2K?

A. 9221 Ward Parkway.

Q. What location did you work from as a senior manager of strategic initiatives?

[24] A. The PCS building at College and Lowell.

Q. Did you ever work out on Sprint's campus?

A. No.

Q. What was your job grade as a senior manager of strategic initiatives?

A. Seventy-nine.

Q. And I believe you've previously mentioned that at some point in time your responsibilities as a senior manager of strategic initiatives changed; is that correct?

A. That's correct.

Q. What were your responsibilities as a senior manager of strategic initiatives when you started in April of 2000?

A. I'm sorry, I can't recall at this time.

Q. What were your responsibilities after they changed as a senior manager of strategic initiatives?

A. I went into project management.

* * *

Appendix G

[30] * * *

Q. When were you separated from employment [31] from Sprint most recently?

A. November 2002.

Q. At the time of your employment with Sprint was separated in November of 2002, did any of your direct reports also lose their jobs?

A. Yes.

Q. Who was that?

A. I'm sorry, I can't recall their names right now.

Q. At the time of your separation of employment in November of 2002, how many individuals were you supervising?

A. Six.

Q. You've previously identified four individuals who you had managed. There's two others that you managed at some point in time.

A. Yes.

Q. Do you recall what their names were?

Appendix G

A. Toyiah Cavole.

Q. Can you spell that?

A. I believe it's C-A-V-O-L-E.

Q. How do you spell Toyiah, do you know?

A. T-O-Y-I-A-H.

* * *

[32] * * *

Q. While you were employed as senior manager of strategic initiatives, did you manage any others other than Rick Steed, Toyiah Cavole, Jim Wenger, Donna Buffington and Diane Clark and a lady who was in her late twenties?

A. Yes.

Q. Who was that?

A. Rob Hisle.

Q. Anyone else?

A. Yes. There were more, but I cannot recall their names at this time.

Q. Do you know what Toyiah Cavole's age was at the time you supervised her employment?

A. Early thirties.

Q. Do you know what Rick Steed's age was at the time that you supervised his employment at Sprint?

A. He was in his thirties.

* * *

[49] * * *

Q. When were you notified of your separation of employment from Sprint?

A. November 2002.

Q. Do you remember the day?

A. I believe it was the 22nd.

Q. And who told you of your separation of employment from Sprint?

A. Chrystal Cone.

[50] Q. And what did Chrystal tell you at the time that she told you your employment was being separated on November 22nd, 2002?

A. That my job was eliminated.

Q. Did she tell you anything else?

A. She gave me a packet.

Q. Anything else?

A. No.

Q. Did she tell you why your employment was being separated from Sprint?

A. Because my job was eliminated.

Q. Any other reasons given?

A. No.

* * *

[51] * * *

Q. (By Mr. Hulla) Did you say anything to Ms. Cone at the time she told you your employment was being separated?

A. Yes.

Q. What did you tell her?

A. I asked why.

Q. And what did she say when you asked why?

A. She said my job was eliminated.

* * *

Appendix G

[58] * * *

Q. (By Mr. Huila) Do you have any reason to believe your position was not eliminated when you were terminated from employment at Sprint in November of 2002?

A. Yes.

Q. Why is that?

A. I spoke with Toyiah Cavole and she told me that she was performing part of my function.

Q. What part of your function was Toyiah Cavole performing?

A. Negotiating service level agreements.

Q. Anything else?

A. Not that I recall.

Q. Negotiating service level agreements, [59] that was the only part of your responsibility as a senior manager of strategic initiatives; is that correct?

A. That's correct.

Q. And do you know if anyone performed your other responsibilities after your separation of employment from Sprint?

A. Yes.

Q. Who was that?

A. Rob Hisle.

Q. What was Rob Hisle doing after your separation of employment from Sprint that you had been doing before?

A. Working on complaints of systems down.

Q. Anything else?

A. Yes.

Q. What else?

A. There was another woman, I can't remember her name, and she was doing the rest of my duties.

Q. Okay. Do you know what the age was of the woman who was doing the rest of your duties?

A. In her thirties.

Q. Toyiah Cavole, what was her job grade at the time of your separation of employment, do you know?

[60] A. I believe it was a 74.

Q. You were 79; is that right?

A. That's right.

Q. And Rob Hisle, what was his job grade at the time of your separation of employment from Sprint?

A. He was a 77.

Q. And the woman whose name you can't recall who was responsible for the rest of your functions, what was her job grade, do you know?

A. Seventy-nine.

Q. So if I understand you correctly, your responsibilities from your position were distributing to Toyiah Cavole, Rob Hisle and an unnamed woman; is that correct?

A. That's correct.

Q. So all of your — as far as you know, all of your job responsibilities were still continuing to be performed at Sprint just by three different individuals; is that right?

A. Yes.

Q. Do you know if anybody ever came in and backfilled your position as senior manager of strategic initiative?

A. No, I don't know.

Appendix G

[61] Q. And again, how is it that you know that Toyiah Cavole was responsible for some of the functions you had prior to your separation of employment?

A. She told me so.

Q. And how was it that you became aware that Rob Hisle was doing some of your responsibilities?

A. He told me.

Q. How about this unnamed woman, how is it that you became aware that she was doing some of your responsibilities?

A. Rob told me.

Q. Do you know how the decision was made to separate your employment from Sprint?

A. No, I do not.

Q. Do you know who made the decision to separate your employment from Sprint?

A. No.

Q. Do you know if you were compared to others at the time of your separation of employment from Sprint?

A. Yes.

Q. Who were you compared with?

A. Other senior managers.

* * *

[62] * * *

Q. Did you ever receive an alpha rating while employed at Sprint?

A. Yes.

Q. What was that?

A. I believe it was an I.

Q. What was your understanding of what an I rating was?

A. Improvement needed.

Q. Who gave you that rating?

[63] A. Sharon Vorhies.

Q. Did you disagree with that rating?

A. Absolutely.

Q. Why was that?

A. Because I didn't — I was a high performer.

* * *

[82] Q. Who did you observe making comments about employees' ages?

A. I don't recall their names.

Q. When was it that you observed employees talking about other employees' ages?

A. What year?

Q. Do you know a time frame?

A. A time frame, it was in the year 2002.

Q. Do you remember where you were when you observed these employees talking about others ages?

A. Yes.

Q. Where were you?

A. In the office.

Q. But you don't recall who the individuals were; is that right?

A. No.

Q. What did these individuals say about these other employees' ages?

A. That there was a lot of young people in our group.

Q. Anything else?

A. That I was the oldest.

Q. Anything else?

A. And that I had the most seniority.

[83] Q. Is that it?

A. That's all I can recall right now.

Q. How many occasions did these conversations occur?

A. A couple.

Q. Were you the oldest employee in your group?

A. Yes.

Q. Did you share their belief that there was a lot of young employees in your group?

A. Yes.

Appendix G

Q. Was it true that you also had the most seniority of anyone in your group?

A. Yes.

* * *

[89] * * *

Q. Mrs. Hoopes, you understand you've been identified as a witness by Ellen Mendelsohn; is that correct?

A. Yes.

Q. And were you aware that she had identified you as a witness who might have knowledge supportive of her claims of widespread age discrimination at Sprint?

A. Yes.

Q. What did you observe relative to widespread age discrimination at Sprint?

A. Coming from the long distance division, there was a balance of people that were over and people that were under 40. When going to PCS, it was if you were over 40, you were an anomaly.

* * *

Appendix G

[92] * * *

Q. Mrs. Hoopes, you've sought to opt into a lawsuit captioned Shirley Williams versus Sprint/United Management Company; is that correct?

A. That's correct.

Q. Why did you do that?

A. Because I felt that I was discriminated against.

Q. Why did you feel you were discriminated [93] against?

A. Because I was over 40.

Q. Is that the only reason why you feel you were discriminated against?

A. No.

Q. What are the other reasons?

A. I feel I was discriminated against because I was on disability.

Q. Any other reasons?

A. And because I received a low rating, a 4 and a shadow I.

Q. Anything else?

A. No.

Q. We've covered your 4 and I rating; is that correct?

A. Yes, we have.

Q. Is there anything at all that we haven't talked about relative to your 4 and I rating that support your belief that you were discriminated against because of your age?

A. Yes.

Q. What is that?

A. Sharon Vorhies told me that I was too old for the job.

Q. When was that?

[94] A. That was when she was discussing my performance.

Q. When was that?

A. I believe it was February, March 2002.

Q. What exactly did Sharon Vorhies say when you were discussing your performance feedback regarding your age?

A. She said that she expected me to be more energetic and adhere to the Jack Welch 4 Rs.

Q. Anything else?

A. Just what I've told you.

Q. What was your response when she told you she expected you to be more energetic?

A. I told her that I felt I was energetic.

Q. So you didn't think you needed to be more energetic?

A. No.

Q. Did she feel you needed to be more energetic because of your age?

A. Yes.

Q. What was your understanding of what the Jack Welch four Rs were?

A. I can't recall them right now.

Q. Did she tell you you needed to adhere to the Jack Welch four Rs because of your age?

[95] A. Not because of my age, no.

Appendix G

Q. Did you believe her comments regarding the Jack Welch four Rs related in any way to your age?

A. Yes.

Q. Why was that?

A. Because she told me I was too old for the job.

Q. Anything else that you can think of that supports your belief that you were discriminated against because of your age, other than what we've talked about so far today?

A. No.

Q. Did you mention earlier that you had used the services at Right Management; is that correct?

A. Yes.

Q. And who provided you those services at Right Management?

A. Sprint.

* * * *

APPENDIX H — EXCERPTS FROM DEPOSITION OF JOHN E. HOOPES, JR. DATED APRIL 24, 2004

ELLEN J. MENDELSOHN vs.

SPRINT/UNITED MANAGEMENT COMPANY

DEPOSITION OF JOHN E. HOOPES, JR.

APRIL 24, 2004

[Commencing at page 5] * * *

Q. What is your date of birth?

A. 4/11/49.

* * *

[6] * * *

Q. Okay. When did you begin working for Sprint?

A. February 15th, 1986, I believe.

* * *

[7] * * *

Q. What was your last day of work at Sprint?

A. February — I think it's February 8th, 2002.

* * *

Appendix H

[22] * * *

Q. And why did you believe you weren't able to apply for other roles at Sprint?

A. Because when I was at the — when they were making the decision for layoffs, we were told that we were not able to apply for jobs.

Q. Were you still employed by Sprint at the time that you were told that?

A. Oh, yes.

Q. And why did they tell you you were unable to apply for other jobs at that time?

A. Because it was being decided by the — whoever that was populating the organization, the reorganized company.

[23] Q. Was there a freeze put on the company at that time from hiring?

A. Not officially. We were told by our director that we were not able to apply for the open positions in the new reorganized one and that they would be chosen.

Q. Okay. So the company was choosing who to retain as part of its reorganization; is that correct?

A. I believe so.

Appendix H

* * *

[25] * * *

Q. When were you told of your separation of employment from Sprint?

A. February 8th.

Q. That was 2002?

A. 2002.

* * *

[26] * * *

Q. Who told you your employment with Sprint was being separated?

A. Informally I was told by my manager on the way to my director's office and formally I was told by my director.

Q. Your manager at the time was?

A. Terri Reynolds.

Q. Who was your director?

A. I don't remember, I'm sorry. I apologize, I just don't remember at this time.

Q. Did Terri Reynolds tell you why your employment with Sprint was being separated?

A. No.

Q. Did your director tell you why your employment with Sprint was being separated?

A. From what I recall, I believe he said they were downsizing.

* * *

[28] * * *

Q. Do you know today who was separated of who reported to Terri Reynolds?

[29]A. In hindsight no one other than me was RIF'd under Terri that I can locate or that I had any contact with.

* * *

Q. Do you know if anyone other than you was separated as part of a reduction in force in February of 2002 who reported up to your director at that time?

A. Yes.

Q. Who were those individuals?

A. There was like 15 or 20 of us and I don't remember their names either.

Q. Do you know what their ages were?

A. Yeah. One was a gentleman — that was not all the people. Let me just say that people that I knew, you know, out of those 20 or 30, there were about five or so that I knew all of them were very close to my age, 55 or older with one exception, and he was 48.

Q. Are you aware of anyone under the age of 40 who was separated in February of 2002 who reported up to your director?

[30] A. None. I'm not aware of any.

* * *

[31] * * *

Q. After your separation of employment from Sprint in February of 2002, were there individuals who reported up to your director who were not separated and were 40 years of age or older?

A. Yes.

Q. Who are they?

A. Terri Reynolds, she was demoted.

Q. Anyone else?

A. Yeah. One other woman and she was in her early forties and she was demoted also.

Q. Were you aware of any employees under the age of 40 that reported up to your director who had been demoted?

A. Other than those two, no.

Q. Those two were over the age of 40; is [32] that correct?

A. Yes.

Q. Were you aware of any employees under the age of 40 who reported up to your director who had been demoted?

A. None that I knew of. In fact, there was more promotions.

Q. Are you aware of anyone over the — strike that. Are you aware of anyone under the age of 40 who was part of a reduction in force in February 2002 in your director's organization?

A. Say that again.

Appendix H

Q. Are you aware of anyone under the age of 40 who was part of the reduction in force in February of 2002 in your director's organization?

A. I don't know all the people that were laid off. I mean, I know roughly how big it was. So for me to say that — I don't know, I really don't know. But the people that I had contact with, there was not a single person below 40.

* * *

[34] * * *

Q. That's okay. The decision to separate your employment would have been made after December of 2001; is that correct?

A. It was made after 2001 because I was laid off in February of 2002. So sometime in there, yes.

Q. Is it your understanding that your position as a software engineer 5 reporting to Terri Reynolds was eliminated?

A. What do you mean by "eliminated"?

Q. Do you know what happened to your responsibilities as a software engineer 5 following your separation of employment?

[35] A. In total they were added to another manager's responsibility.

Q. Who was that?

A. I'm sorry, I don't remember her name. I do remember, you know, I know her age.

Q. What is her age?

A. Her age was roughly 36 or younger.

* * *

[36] * * *

Q. Prior to your separation of employment in February of 2002, had you received a rating for the 2002 calendar year?

A. I believe I had, yes.

[37] Q. What was your rating?

A. I believe it was a 3.

Q. That was under the numeric system; is that correct?

A. That is correct.

Q. Did you receive an alpha rating for 2001?

A. We had not been given any indication that an alpha rating was going to be given to us. We — as far as I know, I did not get an alpha grade, however an alpha grade was assigned to me by — and I don't know by who, but it was assigned to me.

Q. How do you know that an alpha grade had been assigned to you?

A. Several — well, first of all, Terri Reynolds told me that an alpha grade had been assigned to me and she did not know what the alpha grade was.

Q. So it was your understanding that the company had gone through the machination of evaluating your performance under their alpha system; is that correct?

A. That was the first time I heard that there was a letter grade and that it was applied to me.

* * *

[40] * * *

Q. Had you ever used the job interest process to find other employment at Sprint?

A. Yes, many, many, times.

* * *

[41] * * *

Q. Did you have any concerns or complaints about the job interest request process after your employment at Sprint?

A. Yes.

Q. What are those concerns?

A. Lack of response.

Q. Let me make sure I understand what your concerns are. You had used the job interest request process after you were employed by Sprint?

A. Right, at Right Management.

Q. How many positions did you apply for using the job interest request process at Right Management?

A. The numbers are kind of hard to figure, but I applied for — on every Tuesday and Thursday from February 2000 till almost February of 2003 every — I made a goal of applying for at least five jobs on Tuesday and five jobs on Thursday. [42] There were many times when I would apply for 15 to 20 jobs on those days. So to tell you a number, it's very difficult for me to be able to answer that.

Q. I think you said February of 2000. I'm not trying to trick you here.

A. I meant 2002, yes. February of 2002 to February of — well, maybe even a little bit later than that, February '03.

Q. If I understand you correctly, your goal was on Tuesdays and Thursdays of each week to apply for at least five jobs on each of those days; is that correct?

Appendix H

A. On the JIR system using — from Right Management.

Q. And were you targeting those positions that you thought you were qualified to perform?

A. Yes, of course. Even ones that I knew I was overqualified, drastically overqualified.

Q. You understood that the company was still going through reductions in force; is that right?

A. These were for bonafide open positions.

Q. Do you know if those position were ever filled?

A. In many cases, yes.

[43] * * *

Q. Since your separation of employment in February of 2002, have you had contact with any former Sprint employees?

A. Oh, yes.

Q. Who is that?

A. I actually mentioned before, I went weekly or daily from February of 2002 to February of 2003 almost daily. I mean it wasn't every day, but it was at least twice a week, sometimes four times a week to Right Management. Right Management was filled with people that were laid off.

Q. Then were some of the people there over the age of 40?

A. I only saw an occasional person who was [44] less than 40. So the vast majority of them were over 40.

* * *

[51] * * *

Q. Mr. Hoopes, were you aware that you had been identified by Ellen Mendelsohn as an individual with knowledge of allegations of widespread age discrimination at Sprint?

A. Only through this process.

Q. And what information did you have about widespread age discrimination at Sprint?

A. My experience at Right Management.

[52] Q. Anything else?

A. Personal experience.

Q. What were those personal experiences?

A. Personal experiences that I'm over — I was over 50 when I was laid off within three years of early retirement age.

Q. Anything else?

A. That's it I believe. And those are just speculations.

Q. Okay. Your experience at Right Management that included applying for numerous positions at Sprint and not getting any job offers?

A. Yes.

Q. Did you ever get any interviews for any of the positions you applied for while you were looking through Right Management?

A. Yes.

Q. What positions did you interview for?

A. I interviewed for a system administrator, for a position as a project manager like a 1 or 2 and I think that was about it, maybe another one.

Q. You don't remember what the other one was?

A. It was along that line of project manager [53] in the technical arena of some sort.

Q. Were you ever offered any position that you interviewed for?

A. No.

* * *

Q. What else were you referring to when you said experiences at Right Management?

A. We talked about that earlier. It's that the majority of people at Right Management were — the vast majority were elder, older than 40 years old. Elder, that's not the right word.

Q. Anything else that you're referring to when you said your experiences at Right Management other than your contention that the vast majority [54] were older and that you had interviewed for only a few positions and hadn't been offered anything by Sprint?

A. No, I don't think so.

Q. Were you ever dissuaded by anybody from Right Management from applying for positions at Sprint?

A. Weekly.

Q. And who was it that dissuaded you from applying for positions at Sprint?

A. My advisor, whoever that advisor was at that given time.

Q. You don't remember their names?

A. They change from week to week, month to month.

Appendix H

Q. What did they tell you in reference to applying for positions at Sprint?

A. Basically that it may not be a good idea to apply.

Q. Why was that?

A. They never gave me an explanation why.

* * *

[57] * * *

Q. Did you hire individuals over the age of 40?

A. Yes. In both cases the people that were over 40, I had to have vice president approval.

Q. Why was that?

A. Because they were over 40.

Q. Someone told you that you had to have vice president approval to hire anyone over the age of 40?

A. The director told me that.

Q. Which was that?

A. Whichever director I was under at that time.

Q. What position were you in at that time?

A. One was a manager of technical training and the other was a software engineer 5.

Q. And did you raise any complaints to anyone that you had to have a vice president's authorization to hire someone over the age of 40?

A. In wasn't worded as they were over 40. It was worded at his age, okay.

* * *

[59] * * *

Q. Why is it that you feel that the process was discriminatory?

A. Because of what we talked about previously about Right Management and other [60] practices that I've seen.

Q. What are those other practices?

A. Those two cases I was talking about of hiring people that were a little older and more qualified.

Appendix H

Q. You were told you had to get vice president's approval because of their ages; is that right?

A. It wasn't said because of their ages, but because they were not as young maybe, you know, not — basically not — it never came out and was said, Because this person is 42, I need for you —

Q. What was said?

A. In one case specifically I was asked why I would hire someone who was 48 years old.

Q. Who asked you that?

A. That was the vice president of UMV training.

* * *

[61] * * *

Q. And what was said in the other case?

A. The other case was why are you hiring someone — not hiring someone from school.

Q. From where?

A. Out of school or not out of school, but — what is the program where we go — Sprint went to campus and hired people from the campus?

Appendix H

Q. College recruiting.

A. College recruiting. Why wasn't it — why wasn't I hiring someone from the college recruiting.

* * * *

APPENDIX I — PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS FILED JULY 29, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV-DJW

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

PRETRIAL ORDER

Pursuant to Fed. R. Civ. P. 16, a pretrial conference was held in this case on July 19, 2004, before the Honorable David J. Waxse, U.S. Magistrate Judge.

This pretrial order shall supersede all pleadings and control the subsequent course of this case. It shall not be modified except by consent of the parties and the court's approval, or by order of the court on its own motion to prevent manifest injustice. *See* Fed. R. Civ. P. 16(e); D. Kan. Rule 16.2(c).

Appendix I

1. APPEARANCES.

The plaintiff, Ellen J. Mendelsohn, appeared at the pretrial conference through counsel, Dennis Egan. The defendant, Sprint/United Management Company, appeared through counsel, Patrick Hulla.

2. NATURE OF THE CASE.

This is an employment discrimination case. The plaintiff, Ellen J. Mendelsohn, alleges Defendant, Sprint/United Management Company, violated the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 et seq., by terminating her employment.

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1331 and is not disputed.

b. Personal Jurisdiction. The court's personal jurisdiction over the parties is not disputed.

c. Venue. The parties stipulate that venue properly rests with this court.

d. Governing Law. Subject to the court's own determination of the law that applies to the case, the parties agree that the substantive issues in this case are governed by the ADEA, its implementing regulations, and case law interpreting the ADEA and the affirmative defenses raised by defendant.

Appendix I

4. STIPULATIONS.

a. The following facts are uncontroverted:

1. Ellen Mendelsohn's date of birth is August 8, 1951.

2. Bill Blessing's date of birth is August 12, 1955.

3. Paul Reddick's date of birth is January 4, 1962.

4. Jim Fee's date of birth is August 26, 1956.

5. Jo Renda's date of birth is April 17, 1955.

6. Mike Bauerle's date of birth is November 3, 1963.

7. Steve Cote's date of birth is October 19, 1968.

8. Chris Bierbaum's date of birth is April 8, 1966.

9. Whitney Siavelis' date of birth is May 4, 1970.

10. Dan McCauley's date of birth is August 23, 1963.

11. Defendant initially employed plaintiff from September 12, 1983 to September 5, 1986.

12. Plaintiff's last date worked with defendant was November 22, 2002.

b. The following documents, which have been produced in the course of discovery, constitute "business records" within the scope of Fed. R. Evid. 803(6) and may be introduced in evidence during trial subject to objections based solely on grounds of relevancy:

All documents produced by defendant, for which an evidentiary foundation has been, or can be established, which are not privileged or are attorney work product.

c. Copies of exhibits may be used during trial in lieu of originals.

d. The parties have not stipulated to the admission of exhibits at this time. However, by the Friday before trial begins, the parties shall file a stipulation concerning exhibits that can be pre-admitted.

e. At trial, witnesses who are within the subpoena power of the court and who are officers, agents, or employees of the parties need not be formally subpoenaed to testify, provided that opposing counsel is given at least 2 days advance notice of the desired date of trial testimony.

f. By no later than 3:00 p.m. each day of trial, counsel shall confer and exchange a good faith list of the witnesses who are expected to testify the next day of trial.

g. Subject to the court's own determination of the law that applies to the case, the following legal principles are undisputed by the parties:

Appendix I

The essential elements of plaintiff's claim for age discrimination include:

1. She is a member of the protected class,

2. She suffered an adverse employment action;

3. She was qualified;

4. She exhausted her administrative remedies;

5. That the stated reasons given by defendant for the adverse employment action are pretextual;

6. That age was a motivating factor in the adverse employment action; and

7. She was damaged by defendant's actions.

Plaintiff must establish a *prima facie* case and that she exhausted her administrative remedies. If plaintiff establishes a *prima facie* case, the burden of production shifts to defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. Once defendant meets its burden of production, plaintiff must then prove the reason proffered is pretextual and that age was a motivating factor for defendant's actions. If plaintiff establishes pretext and that age was a motivating factor for defendant's action, plaintiff must prove she was damaged.

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5. FACTUAL CONTENTIONS.

a. Plaintiff's Contentions.

Plaintiff, Ellen Mendelsohn claims that her age was a motivating and/or determinative factor in defendant's decision to terminate plaintiff, while retaining younger, less experienced employees, in jobs similar to hers. Plaintiff is a 52 year old female, born in 1951. She had worked for Sprint for 13 years. Prior to November 14, 2002, she held the position of Manager III (Grade 79) in Sprint's Business Development Strategy Group-Mobile Financial Services. On November 14, 2002, plaintiff was notified she was terminated effective November 22, 2002 as a result of a reduction-in-force (RIF). She had always performed her duties in a satisfactory or better manner.

Just two (2) months before plaintiff's termination, a younger male, Chris Bierbaum was transferred *into* plaintiff's group as a Manager, Grade 78. Just before plaintiff's termination in November, 2002, there were four (4) groups within Sprint's Business Development & Strategy department called Incubator Groups. There were three (3) other managers working under James Fee within plaintiff's group. All three (3) of the other managers were under the age of 40. Plaintiff was the oldest manager in her BDS group.

Immediately *after* plaintiff's termination on November 22, 2002, two younger individuals under the age of 40, Whitney Siavelis and Dan McCauley, were transferred *into* plaintiff's group under James Fee. Previously Siavelis had

been assigned "special assignment" which within Sprint means you will no longer have a job once the "special assignment" is completed. It is well-known at Sprint that "special assignment" ordinarily is the "kiss of death." McCauley also was transferred from another department within the Business Development & Strategy Department into plaintiff's group. However, in this case, plaintiff was terminated from her permanent job, while these two younger individuals who had no permanent position were transferred into her group as Managers.

The project plaintiff was working on with the others in her group continued on after her termination. In fact, in her one-on-one and six month performance discussions with her supervisor before her termination, plaintiff was told that the project she was working on was "the most important project within the group." Therefore, defendant's choice to select plaintiff for termination was pretextual, because plaintiff had specific ongoing projects, younger employees without specific jobs were moved into plaintiff's department, plaintiff's group under James Fee actually *increased* in numbers after her termination, and younger employees holding grade-level and job titles similar to plaintiff were treated preferentially by being retained within Sprint in jobs plaintiff could perform.

In the other three (3) incubator groups, there were twelve (12) other managers, in jobs which plaintiff was qualified to perform by education and experience. All twelve managers were younger than plaintiff. All kept jobs within Sprint after the RIF.

b. Defendant's Contentions.

Defendant denies it discriminated against plaintiff by separating her employment. Defendant contends plaintiff's termination of employment was the result of a reduction in force precipitated by cost-cutting measures undertaken by Sprint PCS. Based upon recent performance by plaintiff and others in the BDS organization, plaintiff's managers concluded that others had demonstrated they were better able to perform the jobs that remained in the reorganized BDS department. Defendant contends both the reduction in force and its belief that plaintiff's performance did not justify her continued employment are legitimate non-discriminatory reasons for her separation.

6. THEORIES OF RECOVERY AND AFFIRMATIVE DEFENSES.

a. Plaintiff's Theories of Recovery. Plaintiff asserts that she is entitled to recover upon the following theory:

Plaintiff asserts she is entitled to recover, because she was terminated in violation of the ADEA.

b. Defendant's Defenses. Defendant asserts the following defenses and affirmative defenses:

1. Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff can not demonstrate age was a motivating factor in her separation, nor can she demonstrate pretext.

2. Even if plaintiff proves age was a motivating factor, which defendant denies, Defendant would have made the same decision due to legitimate, non-discriminatory reasons.

3. Plaintiff's claim for liquidated damages is barred by defendant's well established and effective policies against age discrimination, and to the extent any age discrimination did occur, which defendant denies, such discrimination was in violation of defendant's policies and procedures.

4. Plaintiff's claims are barred by her failure to timely exhaust her administrative remedies in that she never filed a charge of discrimination.

5. Plaintiff's damages, if any, were caused in whole or in part by sources other than defendant.

6. Plaintiff has failed to mitigate her damages.

7. Plaintiff's separation was due to reasonable factors other than her age.

8. Plaintiff's claims exceed the matters asserted before the Equal Employment Opportunity Commission.

c. Counterclaims; Cross-Claims; Third-Party Claims.

None.

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7. ISSUES.

a. Plaintiff's Theories of Recovery (i.e. age discrimination)

(1) ***Essential Elements.*** Subject to the Court's own determination of the law that applies to this case, the parties agree that, in order to prevail on her theories of recovery for age discrimination, plaintiff has the burden of proving the following essential elements:

(a) That she is a member of a protected class;

(b) That she suffered an adverse employment action of termination;

(c) That she was qualified for the position at issue;

(d) That the stated reasons given by Sprint for its actions in making RIF decisions were pretextual;

(e) That plaintiff's age was a motivating factor or determinative factor for the adverse employment action; and

(f) That as a result of Sprint's action, plaintiff was damaged.

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Plaintiff asserts that she also has the burden of proving she was treated less favorably than her younger counterparts.

Defendant asserts that plaintiff also has the burden of proving there is some evidence the employer intended to discriminate against her. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998)

(2) ***Issues of Fact.*** With regard to Plaintiff's theories of recovery for age discrimination, one or more of the parties assert that the following issues of fact must be resolved at trial:

(a) Plaintiff asserts the following issue of fact must be resolved at trial: Did Sprint treat younger employees more favorably than plaintiff by terminating plaintiff and keeping and transferring younger employees into plaintiff's department (or other positions for which plaintiff was qualified) just prior to and immediately after plaintiff's termination?

(b) Defendant asserts the following issue of fact must be resolved at trial: Whether Sprint intended to discriminate against Plaintiff by separating her employment during a reduction in force.

(c) Did plaintiff's termination cause her damage? If so, what is the nature and extent of such damages?

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(3) ***Issues of Law.*** With regard to plaintiff's theories of recovery for age discrimination, one or more of the parties assert that the following issues of law much be resolved by the Court:

(a) Plaintiff asserts the following issue of law must be resolved by the Court: Is plaintiff entitled to equitable relief in the form of reinstatement to a permanent Manager's position, plus all raises and bonuses received by other Managers since her RIF through judgment?

Defendant asserts plaintiff's claim for injunctive relief is an issue in equity, rather than an issue of law. Defendant also asserts plaintiff's request for a "permanent Manager's position" is misleading, since Plaintiff was employed by Sprint at-will.

(b) Plaintiff asserts the following issue of law must be resolved by the Court: If plaintiff prevails, what amount of attorneys' fees, costs and expenses are recoverable by plaintiff?

Defendant asserts the amount of attorneys' fees either party may receive is not a matter of law.

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(4) ***Mixed Issues of Law and Fact.*** With regard to plaintiff's theories of recovery for age discrimination, the parties agree that the following mixed issues of law and fact are involved in this case:

(a) Whether the actions taken by defendant were willful, so as to justify submitting the issue of willfulness to the jury.

b. Defendant's First Affirmative Defense (i.e., Good Faith).

(1) ***Essential Elements.*** Subject to the court's own determination of the law that applies to this case, one or more of the parties assert that, in order to prevail on this affirmative defense, defendant has the burden of proving the following essential elements:

Defendant asserts that it must prove the following to establish its good faith defense.

(a) Defendant had a policy prohibiting age discrimination;

(b) Defendant promoted and publicized its policy prohibiting age discrimination;

(c) Any acts or omissions constituting age discrimination (which defendant denies) were contrary to defendant's policy prohibiting age discrimination; and

(d) Defendant made a good faith effort to comply with the ADEA.

Plaintiff asserts good faith is not an affirmative defense.

(2) ***Issues of Fact.*** With regard to this affirmative defense, one or more the parties assert that the following issues of fact must be resolved at trial:

Defendant asserts the following facts must be resolved at trial:

(a) Whether defendant promoted and publicized its policy prohibiting age discrimination;

(b) Whether any acts or omissions constituting age discrimination (which defendant denies) were contrary to defendant's policy prohibiting age discrimination.

Plaintiff asserts good faith is not an affirmative defense.

(3) ***Issues of Law.*** With regard to this affirmative defense, one or more of the parties assert that the following issues of law must be resolved by the court:

Defendant asserts the following issues of law must be resolved by the court:

(a) Whether the good faith compliance standard set forth in *Kolstad v. American Dental Association,* 527 U.S. 526, 119 S.Ct. 2118 (1999) is an affirmative defense upon which defendant bears the burden of proof, or whether plaintiff must disprove defendant's good faith compliance with the ADEA; and

(b) Whether *Kolstad* applies to claims for liquidated damages under the ADEA.

Plaintiff asserts good faith is not an affirmative defense.

(4) ***Mixed Issues of Law and Fact.*** With regard to this affirmative defense, one or more of the parties assert that the following mixed issues of law and fact are involved in this case:

Defendant asserts the following issues of law must be resolved by the court:

Whether defendant's acts or omissions were in good faith.

Plaintiff asserts good faith is not an affirmative defense.

c. Defendant's Second Affirmative Defense (i.e., Failure to Exhaust Administrative Remedies).

(1) ***Essential Elements.*** Subject to the court's own determination of the law that applies to this case,

the parties agree that, in order to prevail on this affirmative defense, defendant has the burden of proving the following essential elements:

(a) Plaintiff failed to file a charge of discrimination;

(b) The EEOC failed to conciliate her charge of discrimination; and

(c) Plaintiff failed to identify within her charge of discrimination the acts or omissions for which she seeks damages.

(2) ***Issues of Fact.*** With regard to this affirmative defense, the parties agree that the following issues of fact must be resolved at trial:

(a) Whether plaintiff filed a charge;

(b) Whether the EEOC conciliated Plaintiff's charge of discrimination; and

(c) Whether plaintiff sufficiently identified the acts or omissions for which she seeks damages.

(3) ***Issues of Law.*** With regard to this affirmative defense, the parties agree that the following issues of law must be resolved by the court:

None.

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(4) ***Mixed Issues of Law and Fact.*** With regard to this affirmative defense, the parties agree that the following mixed issues of law and fact are involved in this case:

None.

d. Defendant's Third Affirmative Defense (i.e., Failure to Mitigate Damages).

(1) ***Essential Elements.*** Subject to the court's own determination of the law that applies to this case, the parties agree that defendant has the burden of proving the following essential elements:

Plaintiff failed to mitigate her damages.

(2) ***Issues of Fact.*** With regard to this affirmative defense, the parties agree that the following issues of fact must be resolved at trial:

(a) Whether plaintiff suffered any damages;

(b) Whether plaintiff made reasonable attempts to mitigate her damages, if any; and

(c) Whether, after her separation of employment, plaintiff's failure to utilize outplacement services offered by Sprint, and her limitations upon her job search to part-time employment, the Kansas City area, and director and vice president level positions constitutes a failure to mitigate her damages.

(3) ***Issues of Law.*** With regard to this affirmative defense, the parties agree that the following issues of law must be resolved by the court:

(a) Whether plaintiff is precluded from making a claim for damages; and

(b) Whether plaintiff's damages, if any, should be reduced as a result of her failure to mitigate damages.

(4) ***Mixed Issues of Law and Fact.*** With regard to this affirmative defense, the parties agree that the following mixed issues of law and fact are involved in this case:

None.

c. Counterclaims; Cross-Claims; Third-Party Claims.

None.

8. DAMAGES.

a. Plaintiff's Damages.

As to plaintiff's claim under the ADEA, as of April 1, 2004, the following figures apply (to be updated, as necessary, at time of trial):

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Past Losses	***Future Losses***	***Total Economic Losses***
$100,883	$854,161	$955,044

Liquidated damages

Double the amount of actual past losses.

Plus an amount to compensate for adverse income tax consequences.

Plus attorneys fees, pursuant to 29 U.S.C. § 621, *et seq.*

b. Defendant's Damages.

None claimed, although defendant will request its costs and attorneys' fees if it is a prevailing party.

9. NON-MONETARY RELIEF REQUESTED, IF ANY.

Plaintiff seeks injunctive relief in the form of (i) reinstatement to her former position with defendant or its equivalent, including any pay raises and promotions she would have received, and (ii) an order restraining defendant from discriminating against plaintiff and any other individual because of that individual's age.

10. AMENDMENTS TO PLEADINGS.

None requested during the pre-trial conference.

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11. DISCOVERY.

Under the scheduling order and any amendments, all discovery was to have been completed by June 1, 2004. Discovery is complete.

12. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3). The parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3) shall be filed no later than 20 days before trial. D. Kan Rule 16.2(e), entitled "Witness and Exhibit Lists and Disclosures," which the court is in the process of amending, will *not* be applied in this case. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A), the disclosures also shall set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)-disclosures that has not previously appeared in the initial Rule 26(a)(1)-disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3) no later than 11 days before trial. Any responses to such objections shall be filed no later than 5 calendar days before trial. The court shall deem waived any objection not timely asserted, unless excused by the court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 5 calendar days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. 'n marking their exhibits, the parties shall use preassigned ranges of numbered exhibits. Exhibit Nos. 1-400 shall be reserved for plaintiff(s); Exhibit Nos. 401-800 shall be reserved for defendant(s); Exhibits 801 and higher shall be reserved for any third party. [Optional: Each exhibit that the parties *expect* to offer shall be marked with an exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare an adequate number of exhibit books, including one book containing the original exhibits, two copies for the court, one copy for opposing counsel, and one copy for each juror if counsel intends to distribute exhibit books to jurors.]

d. Designations of Deposition Testimony.

(1) ***Written Depositions.*** Consistent with Fed. R. Civ. P. 26(a)(3)(B), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be

designated by page and line in a pleading filed no later than 20 days before trial. No later than 11 days before trial, in accordance with Fed. R. Civ. P. 32(a)(4), the opposing party shall file a counter-designation by page and line of any portions of the deposition that the opposing party believes in fairness ought to be considered with the part the offering party has designated, together with any objections to the designations made by the offering party. Any objections to any counter-designations shall be filed no later than 5 calendar days before trial. The court will not entertain any objections to deposition testimony unless and until the parties have attempted in good faith to resolve the dispute among themselves either in person or via telephone conference. Where the court must resolve disputes concerning presentation of deposition testimony at trial, the objecting party shall deliver a copy of the deposition to the trial judge no later than 1 business day before trial. On this copy, those portions of the deposition that are intended to be presented at trial shall be marked by brackets in the margins with different colored highlighting. Red highlighting shall be used for plaintiff(s), blue highlighting shall be used for defendant(s), and yellow highlighting shall be used for any third party.

(2) ***Videotaped Depositions.*** The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. When, however, the parties require rulings outside the presence of the jury to facilitate a "clean" presentation of deposition testimony at trial, written transcripts rather than videotaped transcripts shall be presented in connection with the parties' objections. A party who offers a videotaped deposition must edit the tape

according to the designations and court's rulings so that it can be played in a manner that will not delay the trial.

13. MOTIONS.

a. Pending Motions.

None.

b. Additional Pretrial Motions.

The dispositive motion deadline, as established in the scheduling order and any amendments, is **July 23, 2004**.

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda submitted in connection with all further motions or other pretrial matters shall not exceed 30 pages, absent an order of the court.

c. Motions Regarding Expert Testimony. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-05, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed by the deadline set for dispositive motions.

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 20 days before trial. Briefs in opposition

to such motions shall be filed no later than 15 days before trial. Reply briefs, if any, shall be filed no later than 11 days before trial.

14. TRIAL.

a. This case is set for trial on the court's docket beginning on **January 4, 2005, at 9:30 a.m.** Unless otherwise ordered, this is not a "special" or "No. 1" trial setting. Therefore, during the month preceding the trial docket setting, counsel should stay in contact with the trial judge's courtroom deputy to determine the day of the docket on which trial of the case actually will begin.

b. Trial will be by jury.

c. Estimated trial time is 3-6 days.

d. Trial will be in Kansas City, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Because of constraints on the judiciary's budget for the compensation of jurors, in any case in which the court is not notified of a settlement by **12:00 noon** on the day before the trial is scheduled to commence, the costs of jury fees and expenses will be assessed to the parties, or any of them, as the court may order.

f. Prior to trial counsel shall review the presiding judge's trial guidelines and/ or exhibit instructions on the district's Internet Website:

(http://www.ksd.uscourts.gov/chambers.pdf).

15. SETTLEMENT.

a. Status of Settlement Efforts.

Based upon prior limited settlement efforts, settlement appears unlikely.

b. Mediation and/or Other Method of Alternative Dispute Resolution.

Mediation and/or any other method of alternative dispute resolution are not ordered.

16. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. A Status Conference is set for November 30, 2004 at 10:00 a.m. at 500 State Avenue, Suite 511, Kansas City, Kansas.

b. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. Any trial brief by plaintiff(s) shall be filed no later than 15 days before trial. Any trial brief by defendant(s) shall be filed no later than 11 days before trial. The court does not require trial briefs but finds them helpful, particularly if the parties anticipate that unique or difficult issues will arise during trial.

c. Voir Dire. The parties shall file proposed voir dire questions no later than 15 days before trial. Any objections to such proposed questions shall be filed no later than 11 days before trial. Due to substantially differing views among judges of this court concerning the extent to which counsel should be allowed to participate in voir dire, counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) well in advance of the above-described deadlines to address what, if anything, actually needs to be submitted by way of proposed voir dire questions.

d. Jury Instructions.

(1) Requests for proposed instructions in jury cases shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine that judge's so-called standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is unnecessary to submit such proposed jury instructions to the court. The parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual contentions, the controverted essential elements of any claims or defenses, damages, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is

appropriate, or why its opponent's proposed instruction is inappropriate, or both.

(2) Proposed instructions in jury cases shall be filed no later than 15 days before trial. Objections to any proposed instructions shall be filed no later than 11 days before trial.

(3) In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions (formatted in Word Perfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases.*

e. Findings of Fact and Conclusions of Law. This matter will be tried to a jury such that findings of fact and conclusions of law are not necessary. If there are any equitable issues remaining after the jury returns its verdict, the court will set forth a briefing schedule.

17. OTHER.

a. Conventionally Filed Documents. The following documents shall be served by mail and by fax or hand delivery on the same date they are filed with the court if they are filed conventionally, *i.e.*, not filed electronically: final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and objections; and proposed findings of

fact and conclusions of law. In addition, a party filing a trial brief conventionally shall deliver an extra copy to the trial judge's chambers at the time of filing.

b. Miscellaneous.

None.

IT IS SO ORDERED.

Dated this 29th day of July, 2004, at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
U.S. District Judge

APPENDIX J — DEFENDANT'S MOTION IN LIMINE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED DECEMBER 15, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Cause No. 03-CV-02429-KHV-DJW

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S MOTION IN LIMINE

Defendant Sprint/United Management Company ("Sprint") hereby requests an Order prohibiting Plaintiff, her counsel, and her witnesses from directly or indirectly introducing any evidence, argument or other reference, in the presence of the jury, whether during voir dire or trial, regarding the matters list below, unless and until such matters have first been called to the Court's attention out of the hearing of the jury and a favorable ruling is received as to the admissibility and relevance of same:

1. Any reference to: Sprint having a "pattern and practice" of age discrimination, a culture of age

discrimination, a history of age discrimination, or any similar broad allegation of age discrimination, including through its Alpha rating or staff associate program; any reference to age discrimination litigation against Sprint; and/or any reference to specific allegations of discrimination against Sprint employees not similarly situated to Plaintiff. No "pattern and practice" or disparate impact claim is included in the Pretrial Order of this case. Any alleged discrimination against Sprint employees not similarly situated to Plaintiff lacks probative value in this case. Plaintiff lacks sufficient personal knowledge of any "pattern and practice" of discrimination and/or any discrimination against others. Any references to such matters would require Sprint to defend itself against those references, unnecessarily complicating and lengthening the trial of this case. Any probative value which reference to a "pattern and practice" of discrimination or to discrimination against others not similarly situated to Plaintiff might have would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

2. Any reference to Plaintiff's opinions regarding the performance of any Sprint employee, the qualifications of other Sprint employees, and/or the relative qualifications or performance of any Sprint employees, including but not limited to Plaintiff, Tom Croutch, Brad Shore, John Overy, Patty Porter, Andy Volanakis, Kevin Warner, Mike Bauerle, and James Hallock, including reference to such opinions in an attempt to claim they support her conclusory allegations of age discrimination. Plaintiff lacks personal knowledge regarding the qualifications and performance of other Sprint employees, and any probative value in such reference would

be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

3. Any reference to Sprint's Alpha rating system or staff associate program as having any discriminatory purpose or effect, including any reference to an after-action review. No allegations that Sprint's Alpha rating system or staff associate program had any discriminatory purpose or effect are contained in Plaintiff's Charge of Discrimination, her Complaint, or the Pretrial Order. Even if reference to Sprint's Alpha rating system or staff associate program had any probative value in this case, such value would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. Any references to such matters would require Sprint to defend itself against those references, unnecessarily complicating and lengthening the trial of this case.

4. Any reference suggesting that terminating the employment of Plaintiff, or anyone else, because of her high salary and/or to eliminate costs would be evidence of age discrimination. Employment decisions based on cost are not age discriminatory, even if age correlates positively to salary. Further, any probative value in a reference suggesting that termination employment based on salary or costs would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

5. Any reference to age-derogatory remarks by any Sprint employee. Plaintiff admits she never heard any age-

derogatory comments, and that she has no knowledge that decisionmaker Paul Reddick ever made any age-derogatory remarks. Any reference to age-derogatory remarks would thus be hearsay and irrelevant. Further, any probative value in a reference to age-derogatory comments would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

6. Any reference to the fact that Sprint amended its responses to Plaintiff's Opening Interrogatories to Defendant and/or to any discrepancies between the two responses. Sprint followed the Federal Rules by serving amended answers to correct mistakes contained in the first, unverified response. The amended response was served prior to any depositions of Sprint witnesses such that Plaintiff's case was not prejudiced.

7. Any reference to Plaintiff facing a "David and Goliath" situation with regards to Sprint. Such reference would be irrelevant, and any probative value would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

8. Any reference to the opinions of and/or any appearance by Jie Chen, Ph.D. Although this individual has been listed by Plaintiff as a potential witness in this case, Plaintiff failed to timely disclose Dr. Chen and failed to provide the disclosures and written report as required by Federal Rule of Civil Procedure 26(a)(2) for this purported expert.

9. Any reference regarding Plaintiff's claim that the Equal Employment Opportunity Commission, or any other investigating agency, refused to pursue her Charge of Discrimination because it did not receive responses or information from Sprint. Any such claim would be based on hearsay, and would in any event not be relevant to the issues in this case. Further, any probative value regarding Plaintiff's claim would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

10. Any reference to the fact that counsel for Sprint is from outside Kansas and/or the Kansas City area, including any reference to the fact that counsel is from St. Louis, Missouri. The location of counsel's residence and/or office is not relevant to any issue in this case, and any probative value related to the location of counsel's office and/or residence would be substantially outweighed by the danger of unfair prejudice to Sprint.

11. Any reference to special assignments at Sprint being the "kiss of death" and any similar reference to special assignments. Plaintiff has no basis in fact for her conclusory allegation, and any probative value related to the allegation would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

12. Any reference to any relationship, actual or potential, between Sprint and WorldCom and/or Nextel. Any merger, discussion of merger, or other relationship between Sprint and WorldCom and/or Nextel is irrelevant to the matters at

issue in this case. Any probative value related to such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay.

WHEREFORE, for the foregoing reasons and the reasons set forth in Sprint's Memorandum of Law in Support of this Motion, filed concurrently herewith, Sprint respectfully requests this Court to enter an Order in Limine prohibiting any reference to any of the above matters unless and until such time as a particular matter has been brought to the Court's attention out of the presence of the jury, and the Court rules that reference to that particular matter is admissible and relevant, at which time reference may be made to that matter only.

Respectfully submitted

HUSCH & EPPENBERGER, LLC

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APPENDIX K — MEMORANDUM IN SUPPORT OF DEFENDANT'S IN MOTION IN LIMINE DATED DECEMBER 15, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Cause No. 03-CV-02429-KHV-DJW

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S IN MOTION IN LIMINE

Defendant Sprint/United Management Company ("Sprint") hereby files its Memorandum in Support of Defendant's Motion in Limine.

1. *Broad Allegations of Age Discrimination by Sprint.*

Based on the Complaint and deposition testimony in this case, Sprint anticipates that Plaintiff, her witnesses, or counsel may make conclusory allegations against Sprint of broad age discrimination. Plaintiff, her counsel, and her witnesses should be precluded from presenting any reference: to Sprint having a "pattern and practice", culture, history, or

similarly broad allegation of age discrimination, including through its Alpha rating system or staff associate program; to other age discrimination litigation against Sprint; and/or to specific allegations of discrimination against Sprint employees not similarly situated to Plaintiff.

No "pattern and practice" or disparate impact claim is included in the Pretrial Order, and therefore no "pattern and practice" or disparate impact matters are relevant to the issues in this case. *Youren v. Tintic School District,* 343 F.3d 1296, 1304 (10th Cir. 2003).

Further, any reference to alleged discrimination by any Sprint employee other than Paul Reddick is irrelevant to the issue in this case – whether Paul Reddick's decision to terminate Plaintiff's employment was because of her age. Among other things, for Sprint's treatment of other employees to be relevant to the issue of discrimination against Plaintiff, those other employees must have been "similarly situated" to Plaintiff. Employees may be similarly situated only if they had the same supervisor, and the decisions regarding their employment were made by the same decisionmakers. *Aramburu v. The Boeing Co.,* 112 F.3d 1398, 1404 (10th Cir 1997); *Trujillo v. Sanchez,* 76 F.3d 393, No. 95-2084, 1996 WL 32138 (10th Cir. Jan. 29, 1996); *Babbar v. Ebadi,* 36 F. Supp.2d 1269, 1280 (D. Kan. 1998). Allegations that employees other than Plaintiff were discriminated against thus indicate nothing about discrimination against Plaintiff if those other employees did not share the same decisionmaker with Plaintiff. *Id.*; *Schrand v. Federal Pacific Elec. Co.,* 851 F.2d 152, 156 (6th Cir. 1988).

Accordingly, Plaintiff should be precluded from presenting any reference to discrimination against employees not shown similarly situated to Plaintiff, including but not limited to Marc Elster, Doug Reinhardt, Bonnie Hoopes, John Hoopes, Patty Porter, Yvonne Wood, Sharon Miller, John Borel, Carol Kippes, Shirley Williams, Dawne Adams and/or the younger individuals who purportedly benefited from the alleged discrimination, including, David Morris, Toyiah Cavole, Rob Histe, Andy Volanakis, John Overy, Deanne Patton, Pat Paden, and Darren Collins. (*See* Exhibit A, Excerpts from deposition testimony of Plaintiff ("Plaintiff's dep."), pp. 92-93, 97-98, 101-102; Exhibit B, Excerpts from deposition testimony of Bonnie Hoopes ("B. Hoopes dep."), pp. 23-25, 58-60,109-110; Exhibit C, Excerpts from deposition testimony of Yvonne Wood ("Wood dep."), pp. 39-40, 58, 72, 108-109, 115-116; Exhibit D, Excerpts from deposition testimony of Sharon Miller ("Miller dep."), pp. 16, 18, 20, 60-61, 122-123; Exhibit E, Excerpts from deposition testimony of John Borel ("Borel dep."), pp. 18-21, 75, 99; Exhibit F, Excerpts from deposition of John Hoopes ("J. Hoopes dep."), pp. 7, 25-26, 34-35, 65-67; Exhibit G, Excerpts from deposition of Shirley Williams ("Williams dep."), pp. 67, 69, 96-97, 184). Plaintiff has no evidence that the foregoing individuals' claims of discrimination, the Alpha rating system, or the staff associate program involve discrimination by Paul Reddick. *Id.* Further, any references to such matters would require Sprint to defend itself against those references, unnecessarily complicating and lengthening the trial of this case.

Reference to such issues should thus be precluded as irrelevant. FED. R. EVID. 402. Moreover, any probative value

regarding these issues would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

2. *Conclusory Allegations and Unfounded Opinion Testimony Regarding Discrimination, Performance and Qualfications.*

Based on deposition testimony in this case, Sprint anticipates Plaintiff, her witnesses, or counsel may attempt to present allegations of discrimination supported by opinions, regarding the qualifications and performance of Sprint employees including Plaintiff, for which they have no basis in fact. For example, Plaintiff has claimed that Paul Reddick had a propensity to favor younger employees over older employees, making sure that they got "higher ratings than anybody else." (*See* Ex. A, Plaintiff's dep., pp. 156, 285-86). Plaintiff testified to examples of alleged discrimination including regarding herself, Tom Crouch, Brad Shore, John Overy, Patty Porter, Andy Volanakis, and Kevin Warner. (*See* Ex. A, Plaintiffs dep., pp. 157-58).

Plaintiff, however, admits it was just her "perception" that younger individuals were more highly rated. (*See* Ex. A, Plaintiff's dep., p. 286). Plaintiff further admits that she has no idea or responsibility regarding the performance evaluations of Crouch, Brad Shore, Kevin Warner, John Overy, or Andy Volanakis. (*See* Ex. A, Plaintiff's dep., pp. 140, 158-60). Indeed, with regard to Andy Volanakis receiving better treatment than Patty Porter, Plaintiff admitted she did not even know who made the decisions at issue, and

was basing her accusation against Paul Reddick on "rumor". (*See* Ex. A, Plaintiff's dep., pp. 160-61).

"(C)onclusory allegations without specific supporting facts lack probative value." *Conner v. Schnuck Markets, Inc.*, 906 F. Supp. 606, 614 (D. Kan. 1995), *aff'd*, 121 F.3d 1390 (10th Cir. 1997). "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, an employee's evaluation of her own performance is not relevant evidence of discrimination. *Kitchen v. Burlington Northern and Santa Fe Railway Co.*, 298 F. Supp.2d 1193 (D. Kan. 2004) and cases cited therein. Accordingly, reference by Plaintiff or her witnesses to the performance of any Sprint employee, the qualifications of other Sprint employees, and/or the relative performance or qualifications of any Sprint employee should be precluded. FED. R. EVID. 402. Further, any probative value regarding these issues would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

3. *Sprint's Alpha Rating System and Staff Associate Program.*

Sprint anticipates that Plaintiff, her witnesses, or counsel may attempt to make reference to Sprint's Alpha rating system or staff associate program as having a discriminatory purpose or effect, including reference to an after-action review regarding the Alpha rating system.

Appendix K

Because neither Plaintiff's Complaint nor Charge of Discrimination nor the Pretrial Order contain any reference to the Alpha rating system or staff associate program as being discriminatory, that issue is not relevant to this case. *See Youren,* 343 F.3d at 1304. Further, Plaintiff admitted she had no understanding that the purpose of the Alpha system was to discriminate, and admitted that the purpose of the staff associate program is to select potential high achievers from top schools who already have a business background. (*See* Ex. A, Plaintiff's dep., pp. 87, 245-46). Accordingly, any reference to Sprint's Alpha rating system or staff associate program as having a discriminatory purpose or effect should be precluded as irrelevant. FED. R. EVID. 402. Moreover, any references to such matters would require Sprint to defend itself against those references, unnecessarily complicating and lengthening the trial of this case. Any possible probative value in such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

4. *Elimination of High Salary Costs As Discrimination.*

Sprint anticipates that Plaintiff, her witnesses or counsel may make reference suggesting that an employment decision based on high salary costs is discriminatory. Any such suggestion would be incorrect as a matter of law and thus irrelevant to the age discrimination issues in this case. Even if high salary correlated positively with age, a termination decision based on high salary would not violate the age discrimination laws. *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611 (1993). Even Plaintiff admits that salary would be

a legitimate basis for making termination decisions during a reduction-in-force. (*See Ex.* A, Plaintiff's dep., p. 21).

Accordingly, any reference suggesting that it would be wrongful to base an employment decision on high salary cost should be precluded. Further, any probative value in such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 402-403.

5. *Age-Derogatory Remarks.*

Based on the deposition testimony in this case, Sprint anticipates that Plaintiff, her witnesses, or counsel may make reference to age-derogatory remarks by Sprint employees, including but not limited to situations involving Bennett Gamel and/or Ted Stock. However, Plaintiff admits that she never heard decisionmaker Paul Reddick, or anyone else, make any remarks which suggested a bias against older employees. (*See* Ex. A, Plaintiff's dep., pp. 159, 265). Accordingly, any reference to derogatory comments should be precluded as irrelevant, *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995), and violative of the rules against hearsay. FED. R. EVID. 801-802. Further, any possible probative value in such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

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6. *Inconsistent Interrogatory Responses.*

Sprint anticipates that Plaintiff, her witnesses, or counsel may make reference to the fact that Sprint amended its responses to Plaintiff's Opening Interrogatories to Defendant and/or to any changes made between the original and amended response. Sprint followed the Federal Rules by serving amended responses to the written discovery, and did so before the depositions of any Sprint witnesses such that there was no prejudice to Plaintiff. FED. R. CIV. P. 26(e). Moreover, Sprint's original response remained unverified at the time it was amended, and therefore cannot constitute a valid basis on which to claim Sprint's amended responses demonstrate an inconsistent response from Sprint. Accordingly, any reference to Sprint's having amended its responses to Plaintiff's written discovery and/or to any changes between Sprint's original and amended response would be irrelevant. FED. R. EVID. 402. Further, any possible probative value in such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

7. *David and Goliath Situation.*

Plaintiff, her witnesses, and counsel should be precluded from presenting any reference suggesting that Plaintiff faces a "David and Goliath" situation in this case. Similarly, direct or indirect references to Sprint's ability to pay a judgment, ability to afford certain attorneys, the number of attorneys appearing on behalf of Sprint, the clothes or jewelry worn by counsel and staff, the nature or number of trial exhibits,

demonstrative exhibits, and other evidence, witness fees, hotel accommodations, or to any other matter promoting an inference that this is a "David and Goliath" situation should be precluded. Any such reference would be irrelevant, and any possible probative value would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 402-403.

8. *Jie Chen, Ph.D.*

Plaintiff has listed Jie Chen, Ph.D. as a potential expert witness in this case. However, Plaintiff failed to timely disclose Dr. Chen and failed to provide the disclosures and written report as required by Federal Rule of Civil Procedure 26(a)(2) for this purported expert. Accordingly, any reference to the opinions of and/or any appearance by Jie Chen, Ph.D. should be precluded. FED. R. CIV. P. 37(c); *Mounger v. Goodyear Tire & Rubber Co.*, No. 99-2230-JWL, 2000 WL 1466198 (D. Kan Sept. 22, 2000); *Nguyen v. IBP, Inc.*, 162 F.R.D. 675 (D. Kan. 1995).

9. *Hearsay Regarding E.E.O.C.'s Failure to Pursue Charge.*

Plaintiff testified during her deposition that "I was told that the EEOC was not going to pursue anything with Sprint. I was told that by the EEOC because they get no feedback from Sprint . . ." (*See* Ex. A, Plaintiff's. dep., p. 90). Any reference suggesting that the E.E.O.C. failed to pursue Plaintiff's claim because of Sprint would thus be based on inadmissible hearsay. FED. R. EVID. 801-802. Moreover, any

probative value in a reference to such an explanation would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

10. *Location of Counsel for Sprint's Residence and/or Office.*

Sprint anticipates that Plaintiff, her witnesses, or counsel may refer to the fact that counsel for Sprint is from outside Kansas and/or the Kansas City area, including by making specific mention of the fact that counsel is from St. Louis, Missouri. The location of counsel's residence and/or office is not relevant to any issue in this case, and any probative value related to the location of counsel's office and/or residence would be substantially outweighed by the danger of unfair prejudice to Sprint. Accordingly, all reference to the location of counsel's residence and/or office should be precluded as irrelevant, and because any probative value in such reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 402-403.

11. *Special Assignments as "Kiss of Death".*

Based on Plaintiff's deposition testimony, Sprint anticipates that Plaintiff, her witnesses, or counsel may suggest that special assignments are the "kiss of death" at Sprint, meaning that "Typically at Sprint when people were put on special assignments, it was very often a holding pattern for them before they were kicked out the door." (*See* Ex. A Plaintiff's. dep., p. 350). When asked for examples of this

supposedly "typical" practice, Plaintiff could name only one. (*See* Ex. A, Plaintiff's. dep., p. 351). At the same time, Plaintiff admitted to at least one counter-example in which a special assignment was not the "kiss of death." (*See* Ex. A, Plaintiff's. dep., p. 350). Any reference by Plaintiff to special assignments as the "kiss of death" or any similar reference to special assignments at Sprint should be precluded as unfounded. "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison,* 305 U.S. at 229. Moreover, any probative value in such a reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

12. *WorldCom*

Sprint anticipates that Plaintiff, her witnesses, or counsel may make reference to Sprint's expected merger with Nextel and/or past merger discussions with WorldCom. Any such reference, and any other reference to any relationship, actual or potential, between Sprint and WorldCom and/or Nextel, would be irrelevant to the issues in this case. FED. R. EVID. 402. Moreover, any probative value in such a reference would be substantially outweighed by the dangers of unfair prejudice to Sprint, confusion of the issues, misleading of the jury, and undue delay. FED. R. EVID. 403.

Appendix K

Respectfully submitted

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APPENDIX K-1 — EXHIBIT A
EXCERPTED DEPOSITION OF
ELLEN J. MENDELSOHN
DATED APRIL 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF ELLEN J. MENDELSOHN

[Commencing at page 89]

* * *

Q. And it says, "The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge." Did I read that correctly?

A. Yes, you did.

* * *

Appendix K-1

[92] * * *

Q. Why is it that you believe Sprint has discriminated against other individuals?

A. There are people that I have talked to. I know that — let me back up. There are just a number of people who were let go who were good performers who were getting closer to retirement, who were older, who were singled out versus their younger counterparts, who had more experience. That would lead one to conclude that the company [93] was picking older employees versus the younger employees.

Q. Who were those people?

A. Bonnie Hoopes is one of them, John Hoopes is another. Again, there is a whole slew of people.

Q. Tell me everyone you know who fall in that category.

A. I would have some concerns, again I don't have all the details, but I found it interesting and I'll put that in quotes, that both Doug Reinhardt and Marc Elster were let go and yet their functions weren't terminated, and the people that worked for them seemed to be satisfied with them as supervisors and their work and we had not heard any rumblings about poor performance. Like I said, their jobs didn't go away and all of a sudden young graduates from the staff associate program were brought back in.

* * *

Appendix K-1

[97] * * *

Q. Let me back up because I believe you said you believe other people have been subjected to age discrimination at Sprint; correct?

A. That is correct.

Q. And you indicated there were four individuals, Bonnie Hoopes, John Hoopes, Doug Reinhardt, Marc Elster, is that right?

A. Those are the ones that come to mind right now.

Q. You can't think of anyone else as you sit here today?

A. Not that I could think of right now.

Q. But there are others; right?

A. I'm sure there are others.

Q. And do you know who supervised those others whose names you don't recall at this moment?

A. No, I do not.

Q. Do you know what their performance evaluations were?

A. No, I do not.

Appendix K-1

Q. So this claim that you believe others have been discriminated against because of their [98] age is just based on what?

A. Just based on hearsay through the company.

* * * *

APPENDIX K-2 — EXHIBIT B
EXCERPTED DEPOSITION OF
BONNIE L. HOOPES
DATED APRIL 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF BONNIE L. HOOPES

[Commencing at page 23]

* * *

Q. Was the senior manager of strategic initiatives the last position you held at Sprint?

A. Yes.

Q. What location did you work from as a project manager of Y2K?

A. 9221 Ward Parkway.

Appendix K-2

Q. What location did you work from as a senior manager of strategic initiatives?

[24] A. The PCS building at College and Lowell.

Q. Did you ever work out on Sprint's campus?

A. No.

Q. What was your job grade as a senior manager of strategic initiatives?

A. Seventy-nine.

Q. And I believe you've previously mentioned that at some point in time your responsibilities as a senior manager of strategic initiatives changed; is that correct?

A. That's correct.

Q. What were your responsibilities as a senior manager of strategic initiatives when you started in April of 2000?

A. I'm sorry, I can't recall at this time.

Q. What were your responsibilities after they changed as a senior manager of strategic initiatives?

A. I went into project management.

Q. When did that happen?

A. Like at the end of 2000.

Q. Can you describe to me what you mean by "project management"?

A. I had several people reporting to me that were working on projects, strategic initiatives, [25] for PCS as a whole.

Q. Did the group that you worked in as a senior manager of strategic initiatives have a name of any sort?

A. Yes, it did.

Q. What was it called?

A. The PMO.

Q. PMO is an acronym?

A. Yes.

Q. What does it stand for?

A. Project management office.

* * *

[58] * * *

Q. (By Mr. Hulla) Do you have any reason to believe your position was not eliminated when you were terminated from employment at Sprint in November of 2002?

A. Yes.

Q. Why is that?

A. I spoke with Toyiah Cavole and she told me that she was performing part of my function.

Q. What part of your function was Toyiah Cavole performing?

A. Negotiating service level agreements.

Q. Anything else?

A. Not that I recall.

Q. Negotiating service level agreements, [59] that was the only part of your responsibility as a senior manager of strategic initiatives; is that correct?

A. That's correct.

Q. And do you know if anyone performed your other responsibilities after your separation of employment from Sprint?

A. Yes.

Q. Who was that?

A. Rob Hisle.

Appendix K-2

Q. What was Rob Hisle doing after your separation of employment from Sprint that you had been doing before?

A. Working on complaints of systems down.

Q. Anything else?

A. Yes.

Q. What else?

A. There was another woman, I can't remember her name, and she was doing the rest of my duties.

Q. Okay. Do you know what the age was of the woman who was doing the rest of your duties?

A. In her thirties.

Q. Toyiah Cavole, what was her job grade at the time of your separation of employment, do you know?

[60] A. I believe it was a 74.

Q. You were 79; is that right?

A. That's right.

Q. And Rob Hisle, what was his job grade at the time of your separation of employment from Sprint?

A. He was a 77.

Appendix K-2

Q. And the woman whose name you can't recall who was responsible for the rest of your functions, what was her job grade, do you know?

A. Seventy-nine.

Q. So if I understand you correctly, your responsibilities from your position were distributing to Toyiah Cavole, Rob Hisle and an unnamed woman; is that correct?

A. That's correct.

Q. So all of your — as far as you know, all of your job responsibilities were still continuing to be performed at Sprint just by three different individuals; is that right?

A. Yes.

Q. Do you know if anybody ever came in and backfilled your position as senior manager of strategic initiative?

A. No, I don't know.

* * *

[109] * * *

Q. So you worked for Ellen Mendelsohn between 1991 and 1993; is that correct?

A. Yes.

Q. Did you ever work for Ellen Mendelsohn after 1993?

A. No, I don't believe so.

Q. Did you have occasions as part of your job responsibilities at Sprint after 1993 to interact with Ellen Mendelsohn?

A. As part of my job responsibility?

Q. Yes.

A. No.

Q. Did you ever live with Ellen Mendelsohn at any point in time?

A. No.

Q. There was a document in your personnel [110] records that includes Ellen Mendelsohn's address. I think it was listed as one of your own so that's the only reason I asked. I was just curious.

A. No.

Q. Do you know what Ellen Mendelsohn's performance feedback was in her last role at Sprint?

A. I know what she told me.

Q. What was that?

A. That it was unfavorable.

Appendix K-2

Q. Do you know who gave her that feedback?

A. I don't recall the gentleman's name.

Q. Do you know Ellen Mendelsohn's last job title at Sprint?

A. I don't recall the exact title, no.

Q. Do you know what her last job grade was at Sprint?

A. Yes.

Q. What was that?

A. Seventy-nine.

Q. Do you know what organization she worked in at Sprint?

A. I don't know what they called themselves.

* * * *

APPENDIX K-3 — EXHIBIT C
EXCERPTED DEPOSITION OF YVONNE WOOD
DATED APRIL 22, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF YVONNE WOOD

[Commencing at page 39]

* * *

Q. When were you told of your separation of employment at Sprint?

A. January 15th.

Q. What year was that?

A. 2003.

Appendix K-3

Q. Were you required to come into the office and do any work after January 15th?

A. No.

Q. Who told you that your employment with Sprint was being separated?

A. I actually knew it was happening the day before, but it wasn't official.

Q. How did you know that?

A. Someone leaked it to me.

Q. How did they leak it to you?

[40] A. They told me that I was going to be laid off the next day.

Q. Who was it that told you?

A. My supervisor.

Q. Roberta King?

A. Yes.

Q. Who told you on January 15th, 2003 that you were going to be separated from employment at Sprint?

Appendix K-3

A. Ted Stock. Ted Stock also told me on the 14th.

Q. What did Ted Stock tell you on January 14th about your separation of employment from Sprint?

A. I had given my badge to Roberta King and said I wasn't coming in the next day, after she told me I was getting laid off, but I was not resigning. So she went to Ted — this is what they told me — and he came and told me that I should come in the next day.

Q. Did you come in the next day?

A. I made an appointment with him to be laid off.

* * *

[108] * * *

Q. Previously you mentioned you were aware that Ellen Mendelsohn had raised complaints of age discrimination; is that right?

A. Yes, that's right.

Q. How were you aware of that?

A. I was told by the attorneys.

Q. Do you know Ellen Mendelsohn's last job title at Sprint?

A. No idea.

Q. Do you know what her last job period was at Sprint?

A. No idea.

Q. Do you know what organization she worked?

[109] A. No idea.

Q. Do you know who she reported to?

A. No idea.

Q. Do you know what location she worked in?

A. No.

Q. Do you know if she was exempt or nonexempt employee?

A. No idea.

Q. Do you know what her performance ratings were?

A. No, I don't.

Q. Do you know how long she worked at Sprint?

A. No, I don't.

Appendix K-3

Q. Do you know what her compensation was?

A. No.

Q. Do you know Ellen at all?

A. No.

Q. Have you ever met her?

A. Not that I know of.

Q. Have you ever spoken with her?

A. Not that I know of.

* * * *

APPENDIX K-4 — EXHIBIT D
EXCERPTED DEPOSITION OF SHARON MILLER
DATED APRIL 23, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF SHARON MILLER

[Commencing at page 16]

* * *

Q. You were laid off from Sprint in November of 1999?

A. I'm sorry, 2002, I meant 2002.

* * *

Appendix K-4

[18] * * *

Q. When did you begin working at Sprint as an employee again after Ultreya?

A. In October of 2002. I believe it was effective the first of October.

* * *

[60] * * *

Q. In October of 2002 you were hired into a tech specialist position reporting directly to Cloene Davis; is that right?

A. That's correct.

Q. What was your job grade as a tech specialist?

A. Seventy-nine.

Q. At any point in time while you worked for Sprint as an employee after October of 2002, did your job title change from anything other than a tech specialist?

A. No.

Q. Did your job grade change?

A. No.

Appendix K-4

Q. What were the responsibilities of your function as a tech specialist?

A. My responsibilities were to provide coaching and mentoring to Cloene's directors, in conjunction with Jerry Batt, the CIO's quality improvement plan, quality improvement program, and to organize efforts across her organization to [61] facilitate the implementation of changes in operations, methodologies, techniques to improve operations.

Q. Did your responsibilities include preparing a mission statement for Cloene Davis' organization?

A. Cloene's organization already had a mission statement.

Q. So is that a no?

A. Yes, it is a no. Cloene's organization already had a mission statement. We visited it upon occasion and — but it was not my responsibility to develop that, no.

Q. Did Cloene's organization have a name or title that it went by?

A. It was applications development.

Q. Who did Cloene Davis report to while she supervised your employment?

A. Jerry Batt.

Appendix K-4

Q. Do you know who Jerry Batt reported to while Cloene Davis supervised your employment?

A. I should remember that, but I don't remember the order of — the pecking order, you know, the organizational chart above Jerry. That executive level I just don't recall.

* * *

[122] * * *

Q. Do you know what Ellen Mendelsohn's job title was while she was employed at Sprint?

A. No, I don't.

Q. Did you ever have any opportunity to interact with Ellen Mendelsohn while she was employed at Sprint?

A. No.

Q. Do you know what Ellen Mendelsohn's job grade was when she was — her employment with Sprint was separated?

A. No, I don't.

Q. Do you know what organization Ellen Mendelsohn worked in?

A. No.

Appendix K-4

Q. Do you know who she reported to?

A. No.

Q. Do you know which location she worked at?

A. No.

Q. Do you know what performance ratings [123] Ms. Mendelsohn was given?

A. No.

Q. Do you know how long Ms. Mendelsohn was at Sprint?

A. No.

Q. Do you know what Ms. Mendelsohn's compensation was?

A. No.

Q. Have you ever met Ellen Mendelsohn?

A. Not that I recall. Her name doesn't — her name kind of sounds familiar, but working in a large organization, it's hard to know whether you've ever had contact. I don't recall ever having met her.

Q. While you were employed at Sprint, did your job responsibility ever require you to interact with the BD&S organization at Sprint PCS?

Appendix K-4

A. No, I'm not.

Q. Business development and strategy, does that help refresh your recollection in any way?

A. I remember that — I didn't remember the acronym, but I do remember the business development and strategies. I don't believe I ever interacted with anyone in that organization.

* * * *

APPENDIX K-5 — EXHIBIT E
EXCERPTED DEPOSITION OF JOHN BOREL
DATED APRIL 19, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF JOHN BOREL

[Commencing at page 18]

Q. Who did Janet report to in November of 2000? When I say "Janet," I mean Janet Mathis.

A. You know, we were in a bit of transition there when I first came on board. I don't think they had a director at all and I don't know who was actually — I don't know who she was reporting to to tell you the truth. I think she was even acting at some point in time as director, I don't know. They were just forming the group and, you know, it was very new and I really didn't know a whole lot about, you know, that process of transition. I just joined the team, so I had never met a director at that time.

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Q. Who was Janet Mathus' supervisor at the time your employment was terminated from Sprint?

A. Mohammad Hussain.

Q. Do you recall Janet Mathis reporting to anyone other than Mohammad Hussain while you were employed at Sprint?

A. Unless there was someone early on in that process of transition, he's the one that came in and took over.

Q. Okay. Who did Mohammad Hussain report to at the time of your termination of employment?

A. Mihwa. I forget her last name. She was [19] a senior vice president of the STIC Lab.

Q. Do you know who Mihwa reported to at the time of your termination of employment?

A. I think Dennis Huber, you know, there could be layers between those two. Dennis Huber was senior vice president in charge of PCS.

Q. He was in charge of all of the PCS as far as you know?

A. He was a senior vice president within PCS. He wasn't the head guy, but he was pretty high up.

Q. Do you know who Dennis Huber would have reported to at the time of your termination of employment?

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A. You know, I know I've heard the name, I don't — I really don't know.

Q. Other than Mihwa, do you know if Mohammad Hussain had reported to anyone else while you were employed at Sprint?

A. I don't think so.

Q. Prior to your termination of employment, had you applied for any other positions at Sprint?

A. Prior to my termination?

Q. Let me rephrase that. Prior to your termination of employment, had you applied for any [20] other position at Sprint between the time of your — strike that. I'm struggling, I apologize. While you were employed at Sprint, did you apply for any other role?

A. Only during my transition process after I was laid off.

Q. While you were employed by Sprint, did anybody ever tell you you could not apply for employment for other positions at Sprint?

A. I wasn't allowed to for a while, but they changed their mind.

Q. When were you not allowed to apply for other positions at Sprint?

Appendix K-5

A. Well, a week prior to me being laid off, I went to talk to Jay Cole who was the manager within our directorate who had a vacant PM position. He was wanting me to take that job and work with him and as — after I got laid off, I put in for that position and he had told me that I was not allowed to put in for this because I had been banned and that I had an adverse rating in my file.

Q. Do you remember the day that you spoke to Jay Cole?

A. It was about a week before I got laid [21] off. I got laid off on the 26th of February, 2003, so a week prior to that I guess, that time frame.

Q. Somewhere around February 19th of '03; is that correct?

A. I don't remember that exact date, but it was a weekday, it was not a weekend. I don't remember the date.

* * *

[75] * * *

Q. Mr. Borel, did you ever witness anyone being harassed at Sprint because of their age?

A. Well, yes, I have.

Q. Who was that?

A. Carol Kippes.

Appendix K-5

Q. How do you spell that?

A. K-I-P-P-E-S I think is the way to spell it. She was on the Tacordia team, Pat Baxter's team.

* * *

[99] * * *

Q. Do you know what Ellen Mendelsohn's job title was at Sprint?

A. No, I don't.

Q. Do you know what her job grade was?

A. No.

Q. Do you know which organization she worked in?

A. No.

Q. Do you know who she reported to?

A. No.

Q. Do you know which location she worked at?

A. No.

Q. Do you know what performance feedback she received?

A. No.

* * * *

APPENDIX K-6 — EXHIBIT F
EXCERPTED DEPOSITION OF JOHN E. HOOPES, JR. DATED APRIL 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEPOSITION OF JOHN E. HOOPES, JR.
APRIL 24, 2004

[Commencing at page 7]

Q. What was your next job after technical consultant position?

A. Technical trainer.

Q. How long were you a technical trainer?

A. It's tough to say, probably three years.

Q. What was your job after being a technical trainer?

Appendix K-6

A. Manager of technical training.

Q. How long were you a manager of technical training?

A. That again was about three years.

Q. And what was your job after manager of technical training?

A. I became a project manager, CTI for — just project manager of CTI.

Q. What does CTI stand for?

A. It stands for computer telephony integration.

Q. What was your last day of work at Sprint?

A. February — I think it's February 8th, 2002.

* * *

[25] * * *

Q. When were you told of your separation of employment from Sprint?

A. February 8th.

Q. That was 2002?

A. 2002.

Q. Did you work at any time for Sprint after February 8th, 2002?

A. No.

* * *

[26] * * *

Q. Who told you your employment with Sprint was being separated?

A. Informally I was told by my manager on the way to my director's office and formally I was told by my director.

Q. Your manager at the time was?

A. Terri Reynolds.

Q. Who was your director?

A. I don't remember, I'm sorry. I apologize, I just don't remember at this time.

Q. Did Terri Reynolds tell you why your employment with Sprint was being separated?

A. No.

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Q. Did your director tell you why your employment with Sprint was being separated?

A. From what I recall, I believe he said they were downsizing.

Q. Did your director tell you why others were being retained by Sprint?

A. No.

* * *

[65] * * *

Q. Mr. Hoopes, do you know Ellen Mendelsohn?

A. Only through my wife.

Q. Have you ever met Ellen?

A. Yes.

Q. When was that?

A. Several different occasions, usually social functions that were for my wife's work at Sprint. Occasionally when I visited my wife's job, I would meet Ellen.

Q. This was while your wife worked for Mrs. Mendelsohn?

A. Well, even when she wasn't working directly for her, they were —

[66] Q. Have you spoken with Mrs. Mendelsohn regarding her claims against Sprint?

A. No.

Q. Do you know what Ellen Mendelsohn's job title was at the time her employment was separated?

A. No, I do not.

Q. Do you know what her job grade was at that time?

A. No.

Q. Do you know what organization she worked in at the time of her separation?

A. To be honest with you, no. Not to be honest with you, but honestly, no, I don't know what she —

Q. Do you know who Mrs. Mendelsohn reported to at the time of her separation of employment?

A. No, I have no knowledge of that.

Q. During your employment at Sprint, did you have an opportunity to work with Sprint PCS business development and strategy group?

A. No, not that I'm aware of.

Q. Did you ever have a chance to observe Mrs. Mendelsohn's performance as an employee of Sprint?

[67] A. No.

Q. Never your responsibility to rate her performance?

A. No.

Q. Do you know what performance feedback Mrs. Mendelsohn received while she was employed at Sprint?

A. No, I have no idea.

Q. Do you know how Mrs. Mendelsohn was compensated?

A. No, no idea.

* * * *

APPENDIX L — PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE DATED DECEMBER 20, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

Plaintiff Ellen Mendelsohn hereby files her Memorandum in Opposition to Defendant's Motion in Limine:

I. Evidence of Sprint's Similar Treatment of Other Older Employees is Admissible.

Tenth Circuit law is solidly *against* defendant. And because plaintiff cited the law in her Summary Judgment Response, *defendant knows it*. In fact, the material to follow is taken nearly verbatim from Plaintiff's Memorandum in Opposition to Summary Judgment. (*See* pp. 97-98). And yet

not one of the controlling relevant Tenth Circuit cases is cited or distinguished by Sprint.

Numerous cases recognize that the treatment of older employees other than plaintiff is relevant to a finding of pretext. *Minshall v. McGraw Hill Broadcasting Company, Inc.*, 323 F.3d 1273 (10th Cir. 2003) at 1285: "The testimony of employees, other than plaintiff, is relevant in assessing the employer's discriminatory intent if the employees' testimony can logically or reasonably be tied to the adverse employment action taken against the plaintiff." Here, Ellen Mendelsohn was terminated as part of a RIF. Just like other older, experienced employees, *younger* employees were kept, doing the same or similar duties.

The "other employees" need not work in the same department. Authority for this rule emanates from *Spulak v. K-Mart Corporation*, 894 F.2d 1150 (10th Cir. 1990), which allows evidence from other employees about the circumstances under which they left their employment *from another store.* Two employees who testified they "worked in the same state as Spulak and were fired within a very short time after Spulak left K-Mart," they were allowed to testify "although they worked under a different district manager." *Id.* at 1156-57, n. 2. Thus, employees fired in a RIF in the same general time frame should be allowed to shed light on the issue of pretext.

Spulak likewise involves a "corporate restructuring," and validates much of plaintiff's evidence.

Appendix L

Bingman v Natkin & Company, 937 F.2d 553 (10th Cir. 1991) is another ADEA case — also involving a RIF — in which the Court held that evidence very similar to Ellen Mendelsohn's was sufficient to support the verdict, including "evidence that his position was filled by a younger employee," and "**evidence concerning the makeup of the employment force and events which occurred after plaintiff's termination**. . . ." *Id.* at 556-57 (bold added). The Court held that "evidence not too remote in time that defendant terminated others in the 60-year-old age group [that plaintiff's age group] would be entirely relevant to the question of defendant's policies and practices." *Id.* at 557. The Court held, "The jury was entitled to judge the credibility of the witnesses, to resolve conflicts of evidence in plaintiff's favor, and to find that plaintiff's age was a determinative factor in defendant's decision to terminate his employment." *Id.* at 557.

In *Greene v. Safeway Stores, Inc., supra*, 98 F.3d 554, at 561, the Tenth Circuit *again* endorsed the relevance of evidence concerning the treatment of other employees within a relevant time frame. The *Greene* court quotes favorably from *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990), where the Eighth Circuit affirmed an ADEA plaintiff's judgment in a case involving evidence from employees over 40 leaving the Circulation Department and being replaced by younger employees. *Greene* notes that the Eighth Circuit referred to this showing "as one thread of evidence" that led to upholding the age discrimination award, quoting as follows:

> This fact is certainly not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome.

Quoting *Morgan*, 897 F.2d at 951, quoting *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988).

Defendant fails to acknowledge — much less try to explain away or distinguish — *Minshall*; *Spulak*; *Bingman*; *Greene*; and the Eighth Circuit case of *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990), cited with approval in *Greene*. The weight, unquestionably authoritative and controlling case law cited by plaintiff belies defendant's argument that plaintiff must show the same supervisors. For one glaring example, *Spulak* endorses evidence from other employees about the circumstances under which they left their employment — **from another store.** Every witness listed by plaintiff worked at the same location as plaintiff. In *Spulak*, two employees "worked in the same state as Spulak" (as do *all* of the witnesses plaintiff has named and defendant seeks to exclude), and they were allowed to testify," even though they worked under a different district manager." 894 F.2d at 1156-57, n. 2.

It makes no difference that "pattern and practice" allegations are not included in the Pretrial Order. There is absolutely no indication that the rules stated in *Minshall*, *Spulak*, *Bingman*, or *Greene* require any pattern and practice allegations. Such allegations are not required.[1]

1. Thus, defendant's cite to *Youren v. Tintic School District*, 343 F.3d 1296 (10th Cir. 2003) about the absence of pattern and practice from the Pretrial Order has no application.

Appendix L

It is wrong for the defendant to raise overly general, conclusory accusations about how defendant speculates age discrimination evidence might come in. Defendant's Motion to Prohibit Evidence from other employees terminated in Sprint's reduction-in-force under similar circumstances must be denied.

2. Plaintiff does not intend to offer "conclusory allegations and unfounded opinion testimony" regarding discrimination, performance and qualifications.

Plaintiff intends to testify concerning her **personal observations** regarding Paul Reddick, rather than offer improper opinion testimony and conclusory allegations. She must be permitted to present evidence describing what she saw and observed firsthand, regarding selections made by the defendant (particularly Reddick) in promotions, demotions, and reductions-in-force. The Court must assess this subject in the full context of the trial evidence, including how and in what context it is offered.

This is an age discrimination case. Plaintiff must be allowed proper latitude to try to prove her case, by showing how she was treated compared to other younger employees; she must be allowed to testify regarding her observations of her own workload and her personal hands-on knowledge and experience in working with certain employees. Blanket pretrial prohibitions of evidence are dangerous. *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th Cir. 1988). From all the circumstances, the jury must decide whether defendant's proffered reasons for choosing plaintiff for RIF are pretextual.

Appendix L

Beaird v. Seagate Technology, Inc., 145 F.3d 1159 (10th Cir. 1998).

3. Sprint's Alpha Rating System and Staff Associate Program most certainly may be relevant and admissible.

Sprint's Alpha Rating System most certainly will be relevant as this Court recognized in the Summary Judgment Order. Improper use of the "new" Alpha Rating System, contrary to Sprint's policies and procedures on same, is one piece of evidence on the overall issue of pretext.[2]

Plaintiff does not understand defendant's argument that the Pretrial Order does not contain any reference to the Alpha Rating System or the Staff Associate Program. Many things are not included in the Pretrial Order, because they constitute "evidentiary details" which this Court's rules specifically advise should *not* be included in the Pretrial Order. It would be impossible for a plaintiff to insert into the Pretrial Order every piece of possibly relevant evidence without making the Pretrial Order overly lengthy, and virtually useless.

Plaintiff does not intend herself to offer "opinions" as to whether the Alpha Rating System or Staff Associate Program have "a discriminatory purpose or effect." (*See* Defendant's brief, at 5). To the extent facts on those subjects properly come into play in the evidence, it will be

2. *See* Order Denying Summary Judgment, at page 3 (dealing with the Alpha Rating System, among other subjects); and pages 5-6 (dealing with how the manipulations of the evaluation system constitutes one prong of the evidence going to pretext).

fact-based only. The jury must make its own conclusions as to how they view such pieces of evidence in the context of *all* evidence and inferences derived therefrom. Rule 401 defines "relevant evidence" as meaning: "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Plaintiff's evidence on these subjects meets the test of Rule 401, and must be considered and weighed by the Court in the context of trial.

4. Plaintiff's salary, and her pension status, most certainly will be relevant.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701 (1993) notes that age discrimination "rarely is based on the sort of animus motivating some other forms of discrimination," and that, instead, it is "based in large part on stereotypes unsupported by objective fact." *Id.* at 610. Ellen Mendelsohn's case (like most) does not have "smoking gun" direct evidence admitting age discriminatory motives — nor is any expected or required. *See Denison v. Swaco Geolograph Company*, 941 F.2d 1416, 1420 (10th Cir. 1991). *Denison*, beginning at 941 F.2d 1421, endorses and approves as part of plaintiff's age discrimination claim, "**evidence indicating that the company considered the higher employment cost of older employees in deciding who to retain, thereby raising the inference that age was a direct factor in the decision to terminate him.**" 941 F.2d at 1421 (bold added). Thus, as in *Denison*, Ellen Mendelsohn's salary and the benefits to which she is entitled will be facts admissible because they are "necessary to establish the

amount of damages for the lost benefits to which [Mendelsohn] would have been entitled had she been retained by the company." *Denison, Id.* at 1422.

Plaintiff does *not* contemplate offering evidence that termination motivated by higher salary *alone* violates the age discrimination laws. But contrary to defendant's suggestion, *Hazen Paper Company* supports plaintiff on the principle of law that higher salary, coupled with pension status, may be a proxy for age "not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly." *Hazen Paper Co.*, 113 S.Ct. at 1707. The Court specifically held:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. *Metz*, 828 F.2d, at 1208 . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by [her] pension status.

113 S.Ct. at 1707. The narrow holding in *Hazen Paper* "is simply that an employer does not violate the ADEA just by

interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." *Id.* at 1707-1708. In short, higher salary may be considered as a proxy for age — meaning that the employer might wrongly target higher-paid workers, on the assumption, to quote *Hazen*, "that these employees are likely to be older . . ." *Id.* at 1707.

In *James v. Sears, Roebuck & Company, Inc.*, 21 F.3d 989 (10th Cir. 1994), the Tenth Circuit affirmed a verdict for six former Sears employees, making this exact point in the second paragraph of the opinion:

> The facts before the jury presented either an ill conceived and poorly executed corporate efficiency move or **a deliberate corporate attempt to reduce payroll costs by replacing experienced and well paid workers 40 years of age or older with lesser experienced and lower paid younger workers**. The jury decided it was the latter and rendered judgment in favor of plaintiffs. (bold added).

21 F.3d at 991. *James* is decided after the *Hazen Paper* decision, and thus *James* combined with *Hazen Paper Co.* defeat defendant's motion. Plaintiff's higher salary and her pension status *are probative* evidence that must be received by the jury in the context of all the evidence.

Appendix L

5. Age derogatory remarks most certainly are admissible.

This portion deserves little attention. Of course, evidence of age derogatory remarks made by upper-level management with decision making authority (Bill Blessing, Paul Reddick, or anyone else), are relevant to a finding of age discrimination and pretext. Plaintiff acknowledges that evidence of age derogatory remarks should come from someone who directly heard such remarks from a manager.

6. Plaintiff is entitled to show prior inconsistent Interrogatory Answers under the Rules of Evidence.

Plaintiff asked a straightforward interrogatory, requiring that defendant set forth all persons who had input into the decision to select Ellen Mendelsohn for termination. Sprint's interrogatory response stated: Bill Blessing, Paul Reddick, and James Fee. Only after plaintiff took the deposition of James Fee, and established that he was *not* consulted, did defendant make an effort to amend earlier erroneous responses. The fact is, plaintiff relied on what Sprint is now trying to hide behind, "unverified" answers that presumably never would have been changed or altered absent plaintiff's proving that the answer *was wrong.* It is strange that Sprint would try to hide behind the fact that it represented the interrogatories as "true and correct," only to later play "gotcha," by now saying they were "unverified," plaintiff should not have relied on them.

Appendix L

Under Rule 801(d)(2), what Sprint offered (through its authorized agent/lawyer) as the interrogatory answers of Sprint qualify as an Admission by the party opponent. Such statements are not hearsay, and because they were represented by Sprint to be Sprint's own statement of fact made in a "representative capacity," and because Sprint by tendering the interrogatory "manifested an adoption or belief in its truth," then such statements are admissible at trial. Defendant, of course, is allowed to show reasons for amending the interrogatory. But such explanations simply affect the weight of the evidence, not admissibility. Sprint offers no authority whatsoever for its argument that Sprint can hide behind the fact that its offers were unverified, and that because of such apparent trickery, plaintiff somehow should be precluded from showing the inconsistent statements.

7, 8, 9: David and Goliath; Dr. Chen; EEOC's failure to pursue the Charge.

These can be handled summarily. Plaintiff will not suggest a "David and Goliath" situation. (Unless, of course, Sprint will allow plaintiff to play "Goliath" for a change). Seriously, this silliness about David & Goliath, clothes or jewelry, exhibits, hotel fees, etc. is a non-issue.

Plaintiff does not intend to call Dr. Chen, and made that clear to defense counsel previously.

As to why the EEOC did or did not pursue a Charge, plaintiff's counsel recalls that the comment from Ellen Mendelsohn that is the subject of this Motion came up in response to a question by defense counsel. So if defense

counsel opens up this subject matter, such testimony may be a fair and truthful response to the questioning. Absent that, plaintiff does not intend to affirmatively offer such evidence.

10. Location of counsel for Sprint's residence and/ or office.

In the trial of *Cami Owens v. Sprint* (tried this past October, 2004), Judge Lungstrum requited that the attorneys for both sides identify themselves. This included telling the jury where we reside, and where we office. Such harmless background details must not have had any prejudicial effect, because Sprint won the trial. Plaintiff believes it is proper during voir dire to require the lawyers to identify themselves. Short of that, however, this also is a non-issue.

11. Special Assignment as "kiss of death."

When plaintiff's counsel read this, plaintiff's counsel thought this must have been a cut and paste job from *Cami Owens v. Sprint.* In the *Owens* case, plaintiff had been put on "Special Assignment," and testified that it was considered around Sprint to be the "kiss of death." Judge Lungstrum overruled a Motion in Limine on this topic in *Owens.* Special Assignment is mentioned in paragraph 17 of the Complaint, because the two younger employees who were added to plaintiff's department after Ellen Mendelsohn was dismissed had been on "Special Assignment." Ellen Mendelsohn was asked by counsel if she was aware of that terminology, and she answered that she was and she gave her personal recollection and experience as to how Special Assignment had been the "kiss of death" for some employees at Sprint.

Appendix L

Just as Judge Lungstrum denied the Motion in Limine in *Cami Owens v. Sprint*, if this topic comes up in Ellen Mendelsohn's case, the Court should reserve ruling to see how it is raised in the context at trial. Plaintiff does not believe it to be a major issue.

12. Worldcom.

Plaintiff has no intent to make reference to the expected merger with Nextel and/or the past merger discussions with Worldcom — unless it somehow becomes relevant during the trial by defendant's own actions/statements.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

APPENDIX M — DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED DECEMBER 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Cause No. 03-CV-02429-KHV

ELLEN J. MENDELSOHN

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

Defendant filed its Motion in Limine regarding several matters it anticipated Plaintiff would improperly attempt to insert into the trial of this case. In response, Plaintiff filed a Memorandum in Opposition replete with unsupported arguments and misleading citations. Defendant hereby files its Reply.

Appendix M

1. *Broad Allegations of Age Discrimination/"Pattern and Practice"*

This case is about whether or not Paul Reddick made his decision to terminate Plaintiff because of her age. Accordingly, only evidence relevant to that issue is admissible. Fed. R. Evid. 402.

Applying that principle, the Tenth Circuit has repeatedly recognized that testimony regarding other alleged acts of discrimination is relevant only if it involves the same decisionmaker. *Schneider v. City and County of Denver*, No. 01-1199, 2002 WL 1938583 (10th Cir. Aug. 22, 2002) (. . . "the plaintiff must show the circumstances involving the other employees are such that their statements can 'logically or reasonably be tied to the decision to terminate' plaintiff.") (quoting *Curtis v. Oklahoma City Public Schools Bd. of Education*, 147 F.3d 1200, 1217 (10th Cir. 1998)); *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (. . . "anecdotal evidence of discrimination should only be admitted if 'the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand' . . . Plaintiff can meet this requirement by showing that the same supervisors were involved in prior discriminatory employment actions." (quoting *Simms v. State of Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999)); *Simms*, 165 F.3d at 1330 ("Mr. Simms fails to establish such a connection, for he does not link any of the parties in the current employment action . . . to the employment actions that were the subject of the Simms I litigation"). *See also* discussion, *infra*, in Issue #5.

Appendix M

In her opposition, Plaintiff made several references to the recently tried case of *Owens v. Sprint*. In that case, Judge Lungstrom, following the law of the Tenth Circuit cited above, granted this nearly identical motion and precluded any and all references to discrimination against dissimilarly situated individuals. Judge Lungstrum explicitly precluded reference to individuals who did not share the same decision-maker with Plaintiff. "I will say, however, that for that to be relevant, it would in fact have to meet the criteria that would make the people similarly situated. Generally speaking, that would include the same decision-maker, and that would include employees who had similar degrees of responsibility, and so on and so forth." (*See* Exhibit A, Excerpts from Transcript of Sept. 27, 2004, In Limine Conference held before the Honorable John W. Lungstrum in the case of *Owens v. Sprint/United Management Company*, Case No. 03-2371, at pp. 56-57).

In an attempt to skirt this authority, Plaintiff has tried to piece together an argument by making unsupported conspiratorial allegations about what "defendant knows", by ignoring the overwhelming case authority, and by making misleading citations to relevant authority. In fact, the authority cited by Plaintiff stands for the opposite proposition for which it was cited. For example, the very first case cited by Plaintiff is *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F.3d 1273 (10th Cir. 2003). In *Minshall*, the Court explicitly approved the admission of testimony by other employees about their own alleged experience of age discrimination precisely **because** those employees were supervised and/or demoted by the exact same individual who recommended the termination of Mr. Minshall. *Id.* at 1285-

1286. Similarly, in *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), a case cited by Plaintiff because another employee with a different manager was allowed to testify, Plaintiff ignores the fact that the Court explained its decision by observing that the other employee's manager had specifically referred to the Plaintiff's early retirement as being "at K Mart's request" when encouraging the other employee to also consider retirement. *Id.* at 1156, n. 2. Plaintiff's reliance on *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), suffers from the same flaw. In that case, Plaintiff was terminated by the CEO. The other high-level executives permitted to testify had all also been replaced by younger individuals within months after the same CEO had assumed his new office. In *Bingman v. Natkin & Co.*, 937 F.2d 553 (10th Cir. 1991), another case cited by Plaintiff, there is not even any discussion as to who the relevant decisionmaker was.

Because the law is clear that discrimination against other employees may be relevant only if it involves the same decisionmaker involved in Plaintiff's termination and same levels of responsibility as Plaintiff, Sprint's Motion in Limine regarding broad allegations of age discrimination should be granted. Thus, Plaintiff and her counsel shouldn't be allowed to make reference to other employees unless and until such a foundation is made that the other employee is similarly situated to plaintiff.

Appendix M

2. *Conclusory Allegations and Unfounded Opinion Testimony Regarding Discrimination, Performance and Qualifications*

Sprint moved in limine to preclude Plaintiff, her witnesses, and counsel from attempting to support her claims by offering opinions regarding the performance of any Sprint employee, the qualifications of other Sprint employees, and/or the relative performance or qualifications of any Sprint employee. Sprint anticipated Plaintiff might attempt to make reference to such matters because Plaintiff testified during her deposition that it was her "perception" that Paul Reddick made sure younger employees received higher ratings than younger employees, even though she also admitted she had no knowledge about the ratings given to the younger employees.

Plaintiff may testify about relevant facts of which she has first-hand knowledge. Plaintiff, and other witnesses, however, may not repeat rumors or offer speculation or make conclusory allegations. If by "observations" Plaintiff means unfounded "perception", she may not offer those either. *Conner v. Schnuck Markets, Inc.*, 906 F. Supp. 606, 614 (D. Kan. 1995), *aff'd*, 121 F.3d 1390 (10th Cir. 1997); *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, an employee's evaluation of her own performance is not relevant evidence of discrimination. *Kitchen v. Burlington Northern and Santa Fe Railway Co.*, 298 F. Supp.2d 1193 (D. Kan. 2004) and cases cited therein. Accordingly, Sprint's Motion in Limine regarding conclusory allegations and opinion testimony regarding performance and qualifications should be granted.

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3. *Sprint's Alpha Rating System and Staff Associate Program*

To the extent it is otherwise admissible, Sprint has not objected to Plaintiff's reference to its Alpha Rating System and Staff Associate Program. Sprint, however, anticipates that Plaintiff may attempt to directly or indirectly suggest that that those programs are themselves discriminatory in purpose or effect. Although Plaintiff offers no legal support, her Opposition implies that Plaintiff intends to do just that, even if under the guise of letting the jury "make its own conclusions."

Plaintiff misses the point. This case is about whether or not Paul Reddick made his decision to terminate Plaintiff because of her age. The issue of whether the Alpha Rating System and/or Staff Associate Program are discriminatory is not part of this case. Accordingly, attempts to inject that issue into this case would be irrelevant, highly prejudicial and contrary to the agreed upon Pretrial Order.

4. *High Salary Costs and Pension Status As Discrimination*

This is an age discrimination case under the ADEA. Based on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), Sprint requested an Order prohibiting Plaintiff, her witnesses, and counsel from suggesting that an employment decision based on high salary costs is discriminatory. *Hazen* and its progeny make clear that such an Order accurately reflects the applicable law.

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Federal courts addressing the issue, including the Tenth Circuit, have universally recognized that *Hazen Paper* stands for the proposition that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age", even if that feature may correlate with age. *Id.* at 609. *See also Brodie v. General Chemical Corp.*, 112 F.3d 440, 442 (10th Cir. 1997) (approving jury instruction which provided that decision motivated by pure economic benefit to employer was defense to age claim) (quoting *Hazen*, 609); *Green v. Safeway Stores, Inc.*, 98 F.3d 554, 562-563 (10th Cir. 1996) (noting that *Hazen Paper* permits consideration of pension status when based on years of service); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007-1009 (10th Cir. 1996) ("The ADEA requires the employer to ignore an employee's age . . . it does not specify further characteristics that an employer must also ignore.") (quoting *Hazen* at 612); *Elza v. Koch Industries, Inc.*, 16 F. Supp.2d 1334, 1341 (D. Kan. 1998) ("In *Hazen*, the Supreme Court noted that discrimination based on seniority was not prohibited by the ADEA . . .").

"This rationale applies with equal force to cases where workers are discharged because of salary considerations." *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125-1126 (7th Cir. 1994). Accordingly, "'employment decisions motivated by characteristics other than age (such as salary and pension benefits), even when such characteristics correlate with age, do not constitute age discrimination.'" *Dammen v. Unimed Medical Center*, 236 F.3d 978, 981 (8th Cir. 2001) (parenthetical in original) (quoting *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 647 (8th Cir. 1997) (citing *Hazen Paper*)).

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In the face of this body of law, Plaintiff cites only two inapposite cases. First, Plaintiff relies heavily on *Denison v. Swaco Geolographic Co.*, 941 F.2d 1416 (10th Cir. 1991). *Denison* pre-dates the Supreme Court's decision in *Hazen Paper*, and thus does not reflect current law. Second, Plaintiff quotes from *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989 (10th Cir. 1994), and suggests that the quote reflects a proper interpretation of the *Hazen Paper* holding. In fact: the quoted language appears only in the Court's opening description of the background facts of the case; the issue of whether cutting costs could be evidence of age discrimination is not analyzed at all; and *Hazen Paper* is never mentioned, much less interpreted, in the opinion.

Plaintiff should be precluded from suggesting that an employment decision based on any characteristic other than age, including salary or pension status, is discriminatory.

5. *Age-Derogatory Remarks*

This case is about whether or not Paul Reddick made his decision to terminate Plaintiff because of her age. Accordingly, only evidence relevant to that issue is admissible. Fed. R. Evid. 402.

Applying that principle, the Tenth Circuit has repeatedly recognized that age-derogatory comments made by someone other than the decisionmaker are not relevant evidence of discrimination. Indeed, the Tenth Circuit has specifically rejected Plaintiff's contention that a derogatory statement by any member of upper-management is thereby relevant. In *Cone v. Longmont United Hosp., Ass'n*, the plaintiff alleged

that the hospital's Chief Executive Officer made an age-derogatory comment. 14 F.3d 526, 531 (10th Cir. 1994). Finding that the comment was a "stray remark", the Court stated: "We have no evidence that Mr. Huey participated in Ms. Cone's automatic termination, and age-related comments by non-decisionmakers are not material in showing the hospital's action was based on age discrimination". *Id.*; *See also Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995) ("This stray remark by someone not in a decision-making position does not establish intent to discriminate") (citing *Cone*, 14 F.3d at 531); *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994) (comment by non-decisionmaker held not evidence of age discrimination). Plaintiff cites no contrary law.

Accordingly, Sprint's motion regarding reference to age-derogatory comments made by anyone other than Paul Reddick should be granted.

6. *Amended Interrogatory Responses*

The Federal Rules of Civil Procedure permit, and even require, that interrogatory answers be amended. Fed. R. Civ. P. 26(e). The purpose of this rule would be undermined if an interrogating party could use the answering party's compliance with the rule to its tactical advantage. Further, Plaintiff has Sprint's amended answers, and may use them to the extent otherwise permitted by the rules of evidence. The fact itself that Sprint may have changed its answers is not relevant, and Plaintiff offers no explanation as to how the fact that Sprint amended an interrogatory answer might be relevant to the issues in this case. Moreover, Sprint would

be unduly prejudiced by any reference to the amendment of its interrogatory responses, and the trial of this case would become unnecessarily confused by forcing Sprint to explain the discovery process and the Rules of Civil Procedure.

Accordingly, Sprint's Motion in Limine regarding the amendment of its interrogatory responses should be granted.

7. *David and Goliath Situation*

Plaintiff apparently has no objection to Sprint's Motion in Limine regarding reference to this case being a "David and Goliath" situation, and Sprint's Motion should be granted.

8. *Jie Chen, Ph.D*

Plaintiff apparently has no objection to Sprint's Motion in Limine regarding reference to appearance by, or reference to Dr. Chen, and Sprint's Motion should be granted.

9. *E.E.O.C.'s Failure to Pursue Charge*

Plaintiff apparently has no objection to Sprint's Motion in Limine regarding reference to an alleged failure of Sprint to provide requested information as the reason the E.E.O.C. failed to pursue her Charge, and Sprint's Motion should be granted.

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10. *Location of Counsel for Sprint's Residence and/or Office*

Sprint's Motion in Limine requested that Plaintiff, her counsel, and her witnesses be precluded from referencing the location of counsel's residence and/or office. Accordingly, Plaintiff's diatribe regarding voir dire questions from the Court is not responsive.

Because Plaintiff raised the issue, Sprint responds as follows. Sprint does not believe that the location of the residence and/or office of its counsel is relevant information, and believes such information would thus serve only to prejudice the jury against Sprint because of its use of out-of-town counsel. It is obviously important for counsel to identify themselves during voir dire in order to determine whether any of the potential jurors knows counsel. However, accomplishing this purpose does not require reference to counsel's place of residence or office. A simple question asking whether anyone knows counsel or their firms would suffice. In fact, concern about relationships between the venire and counsel should be lessened, not heightened, by the fact counsel is from outside the Kansas City area.

11. *Special Assignment as "Kiss of Death"*

Sprint's Motion sought to preclude reference to special assignments as being the "kiss of death" because there is no basis for such a conclusion, and because such reference would be prejudicial. Plaintiff's Opposition first suggests that Sprint's Motion is irrelevant to this case, but then proceeds to oppose the Motion. Moreover, despite downplaying the

issue, Plaintiff mentions it in her Proposed Jury Instructions. Plaintiff's Opposition, however, fails to offer any legal basis for her objection, other than the fact that Judge Lungstrum denied a similar motion by Sprint in the *Owens* case.

In *Owens*, the plaintiff alleged that she was placed on "special assignment" as a precursor to a subsequent demotion and she further alleged that "everyone at Sprint knows that special assignment is the kiss of death." The plaintiff in this case has made no such allegation. This is merely another attempt by Plaintiff to introduce any possible negative evidence against Sprint which she can muster, regardless of whether or not it actually has anything to do with the facts of the case. Accordingly, Sprint's Motion regarding this issue should be granted.

12. *WorldCom/Nextel*

Plaintiff apparently has no objection to Sprint's Motion in Limine regarding reference to actual or potential mergers between Sprint and Nextel and/or WorldCom, and Sprint's Motion should be granted. Oddly, although Plaintiff disclaims any intent to make reference to such matters, Plaintiff's proposed voir dire questions (page 4) make explicit reference to Sprint's merger with Nextel.

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Respectfully submitted

HUSCH & EPPENBERGER, LLC

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and

HUSCH & EPPENBERGER, LLC
By: /s/ Christine F. Miller
Christine F. Miller (admitted *pro hac vice*)
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Attorneys For Defendant Sprint/United Management Company

APPENDIX N — DEFENDANT'S RULE 26(a)(3) FINAL WITNESS DISCLOSURES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED DECEMBER 15, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S RULE 26(a)(3) FINAL WITNESS DISCLOSURES

COMES NOW Defendant Sprint/United Management Company, by and through its attorneys, and in compliance with this Court's July 29, 2004 Pretrial Order and Rule 26(a)(3)(A) and (B) of the Federal Rules of Civil Procedure, provides the following as its final witness disclosures:

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Chris Bierbaum	Consistent with his deposition testimony: • His interactions with, observations of, and discussions with Plaintiff; and • The absence of discrimination within Jim Fee's and Paul Reddick's organizations • His job duties and responsibilities within the BDS department both before and after the reorganization		X
William ("Bill") Blessing	Consistent with his deposition testimony: • Directives and efforts to reduce expenses in Sprint PCS Business Development and Strategy organization ("BDS"); • His decisions to reorganize BDS and approval of the non-discriminatory decisions to retain and separate employees;	X	

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	TO CALL	EXPECT MAY CALL
	• His interactions and discussions with Paul Reddick regarding Reddick's reports; • Reddick's assignment to, and return from, a Business to Business ("B2B") project; • The organizational structure of and distribution of responsibilities within BDS; • The job duties and responsibilities for various positions within the BDS department both before and after the reorganization; and • Succession Planning within BDS, observations made about Plaintiff and her peers during Succession Planning, and related documentation.		

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Steve Cote	Consistent with his deposition testimony: • His interactions with, observations of, and discussions with Plaintiff; • The absence of discrimination within Jim Fee's and Paul Reddick's organizations; and • His job duties and responsibilities within the BDS department both before and after the reorganization		X
Tom Crouch	• His interactions with, observations of, and discussions with Plaintiff; • The absence of discrimination within Paul Reddick's organization; and • His job duties and responsibilities within the BDS department		X

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NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
James ("Jim") Fee	Consistent with his deposition testimony: • His interactions and correspondence with Plaintiff and her peers; • Complaints he received from others about Plaintiff; • His observations and evaluations of Plaintiff's performance and behavior relative to her job requirements and peers; • Feedback he provided to Reddick regarding Plaintiff; • His reporting structure (ascending and descending) • His decision to hire Chris Bierbaum; and • Organizational changes and distribution of responsibilities within the Mobile Financial Services ("MFS") group	X	

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
A.J. Francis-Otjen	Consistent with his deposition testimony: • Her interactions with, observations of, and discussions with Plaintiff; and • The absence of discrimination within Paul Reddick's organization • Her decision against hiring Plaintiff as a director level employee		X
Leona Garrett	• Her interactions with, observations of, and discussions with Plaintiff; • The absence of discrimination within Paul Reddick's organizations; and • Her job duties and responsibilities within the BDS department both before and after the reorganization		X

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NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Debbie Law	• Her interactions with, observations of, and discussions with Plaintiff; • The absence of discrimination within Jim Fee's and Paul Reddick's organizations; and • Her job duties and responsibilities within the BDS department both before and after the reorganization		X
Dan McCauley	• The absence of discrimination within Jim Fee's and Paul Reddick's organizations; and • His job duties and responsibilities within the BDS department both before and after the reorganization		X

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Ellen Mendelsohn	• Allegations in her Complaint that she has not abandoned; • Plaintiff's employment history, including prior reductions in force and her failure to be promoted beyond the job grade she was re-hired into 13 years before her separation; • The absence of ageist remarks or animus by decision-makers; • The legitimate, non-discriminatory reasons for the reorganization and reduction in force impacting BDS; • Her contentious relationship with a co-worker; • Her search for other employment after communications from Fee about her performance;		X

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NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
	• Her job duties at the time of her separation, which were not managerial in nature; • Her failure to report concerns of age discrimination to Bill Blessing, Jim Fee, HR, or through Sprint's ethics hotline; • Her training regarding Sprint's equal employment opportunity policies and internal complaint procedures; • Her concerns about her performance being perceived as less than acceptable; and • Her efforts to find other employment, including her use of outplacement services provided by Sprint.		

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Paul Reddick	Consistent with his deposition testimony: • His interactions and correspondence with Plaintiff and her peers; • Complaints he received from other employees about Plaintiff; • His observations and evaluation of Plaintiff's performance and behavior relative to her job requirements and peers; • Feedback about Plaintiff; • His reporting structure (ascending and descending) and assignment to, and return from, a B2B project; • Directives and efforts to reduce expenses in BDS; • Decisions to reorganize BDS and MFS;	X	

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
	• The organizational structure of and distribution of responsibilities within BDS and MFS; • His non-discriminatory decisions to retain and separate employees; • Sprint's transition from, and use of, a numeric rating system to an alpha rating system; • Succession Planning within BDS, observations made about Plaintiff and her peers during Succession Planning, and related documentation; • His opinions regarding Fee's evaluation of Plaintiff and others; and • Organizational changes within BDS and MFS.		

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Ralph Reid	• His interactions and discussions with Plaintiff		X
Jo Renda	Consistent with her deposition testimony: • Organizational changes within BDS; • Plaintiff's compensation and benefits, Sprint's compensation and benefits practices, and Sprint's position control (e.g., job grades, job titles, etc.); • Sprint's equal employment opportunity policies, training, and internal complaint procedures; • Her support of BDS management as a human resources professional;	X	

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
	• Her review of management's decisions to reorganize BDS and separate and retain employees during a reduction in force and documentation regarding the same (other than privileged attorney-client communications); • Sprint's displacement guidelines; • Sprint's performance evaluation systems and related documentation; and • Sprint's Succession Planning process		
Whitney Siavelis	• The absence of discrimination within Jim Fee's and Paul Reddick's organizations; and • Her job duties and responsibilities within the BDS department both before and after the reorganization		X

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Kevin Warner	• His interactions and correspondence with Plaintiff and her peers; and • His observations and evaluation of Plaintiff's performance and behavior relative to her job requirements and peers.		X
Doug Reinhardt	• His interactions with Plaintiff; • His observations of Plaintiff and Paul Reddick; • The organizational structure of and distribution of responsibilities within BDS and MFS; • The absence of age discrimination at Sprint; and • Various job duties and responsibilities within the BDS department		X

NAME	SUBJECT MATTER/SUMMARY OF TESTIMONY	EXPECT TO CALL	MAY CALL
Witnesses Disclosed by Plaintiff	• The witnesses previously disclosed by Plaintiff pursuant to Rules 26(a)(1) and (2), and any supplementation thereto, and those witnesses disclosed by Plaintiff pursuant to Rule 26(a)(3)		X
Rebuttal and Impeachment Witnesses	• Contingent upon Plaintiff's evidence		X As needed
Custodians of Records	• Contingent upon exhibits used		X As needed

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Respectfully submitted

HUSCH & EPPENBERGER, LLC

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APPENDIX O — PLAINTIFF'S OBJECTIONS TO LIST OF DEFENDANT'S WITNESSES DATED DECEMBER 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

PLAINTIFF'S OBJECTIONS TO WITNESSES LISTED BY DEFENDANT

COMES NOW plaintiff, and pursuant to the Pretrial Order in this case, plaintiff hereby objects to the following witnesses listed by defendant:

***Tom Crouch*:** Plaintiff objects to defendant calling Tom Crouch as a witness at trial because Mr. Crouch had *no* involvement in the decision to terminate plaintiff. Mr. Crouch was *never* a supervisor of plaintiff and has *never* been identified by defendant or any of defendant's representatives as having voiced any complaint about working with plaintiff and/or plaintiff's job performance.

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Defendant has identified Mr. Crouch as potentially giving testimony of the "absence" of discrimination within Paul Reddick's organization. Defendant would be asking Mr. Crouch to give his opinion as to the absence of discrimination under Paul Reddick. This testimony is totally inadmissible at trial.

A.J. Francis-Otjen: Plaintiff objects to defendant calling A. J. Francis-Otjen as a witness at trial because Ms. Francis-Otjen had no involvement in the decision to terminate plaintiff. Ms. Francis-Otjen was *never* a supervisor of plaintiff and has *never* been identified by defendant or any of defendant's representatives as having voiced any complaint about working with plaintiff and/or plaintiff's job performance. Defendant has identified Ms. Francis-Otjen as potentially giving testimony of the "absence" of discrimination within Paul Reddick's organization. Defendant would be asking Ms. Francis-Otjen to give her opinion as to the absence of discrimination under Paul Reddick. This testimony is totally inadmissible at trial. Defendant has also identified Ms. Francis-Otjen as possibly giving testimony as to why she decided against hiring plaintiff as a director level employee. This testimony has no relevance as to defendant's reasons for choosing plaintiff for termination.

Leona Garrett

Debbie Law Plaintiff objects to defendant calling Leona Garrett and Debbie Law as witnesses at trial because these individuals are Administrative Support within the BDS organization. Neither of these individuals had any involvement in any decision as to who would be terminated,

who would stay, who would be transferred, etc. in the November, 2002 RIF. Neither of these individuals are in a supervisory position and do not make any employment decisions regarding employees. Any testimony from these individuals would be totally irrelevant to any issue in this lawsuit and inadmissible.

***Ralph Reid*:** Plaintiff objects to defendant calling Ralph Reid as a witness at trial in this case. Defendant has described Mr. Reid's potential testimony as "his interactions and discussions with plaintiff." This is so vague that plaintiff's objection is based on relevancy. Mr. Reid had no input into the decision to terminate plaintiff and was never identified by defendant as having voiced any complaint about plaintiff and/or plaintiff's performance.

THE POPHAM LAW FIRM, P.C.

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ATTORNEYS FOR PLAINTIFF

APPENDIX P — PLAINTIFFS' FINAL LIST OF POTENTIAL WITNESSES DATED DECEMBER 16, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN MENDELSOHN

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

PLAINTIFFS' FINAL LIST OF POTENTIAL WITNESSES

COMES NOW plaintiff, by and through her attorneys, and pursuant to the Pretrial Order entered in this case, plaintiff respectfully submits the attached final list of potential witnesses that may be called at trial. A copy of such witness list has also been provided to counsel for defendant by ECF filing.

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THE POPHAM LAW FIRM, P.C.

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ATTORNEYS FOR PLAINTIFFS

* * *

PLAINTIFFS' FINAL LIST OF POTENTIAL WITNESSES

WITNESSES WHOM PLAINTIFF EXPECTS TO PRESENT AT TRIAL

(EITHER IN PERSON OR BY DEPOSITION TESTIMONY)

1. Ellen J. Mendelsohn
   2712 West 141st Street
   Leawood, KS 66224

Plaintiff has knowledge of her allegations in her Complaint, including but not limited to: her employment with defendant; her job description; job performance; job duties and job responsibilities; reasons plaintiff was selected for termination; the age composition of the Business

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Development and Strategy department; Paul Reddick's preference for younger employees; Sprint's job search and hiring of younger individuals in positions for which plaintiff was qualified; and her damages.

2. James Fee - (Employee of Sprint)
   14219 Eby
   Overland Park, KS 66221

The above individual will have knowledge of plaintiff's allegations in her Complaint, including but not limited to: plaintiff's employment with defendant; plaintiff's job description; job performance; job duties and job responsibilities; the organizational structure of the Business and Development and Strategy Groups; reasons plaintiff was selected for termination; the age composition of the Business Development and Strategy department; the transferring of Chris Bierbaum into plaintiff's group just prior to plaintiff's termination; reasons why Whitney Siavelis and Dan McCauley were brought into plaintiff's group immediately after plaintiff's termination; the performance evaluation of the members of plaintiff's group and the entire department; Sprint's LINK and Alpha rating system; reasons plaintiff was not given any other Manager's position within Sprint when others within BDS were; Sprint's job search and hiring of younger individuals in positions for which plaintiff was qualified; defendant's policies and procedures; age bias comments by defendant's management toward older employees; and plaintiff's damages.

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3. Paul Reddick - (Employee of Sprint)
   8008 W. 145th
   Overland Park, KS 66223

The above individual will have knowledge of plaintiff's allegations in her Complaint, including but not limited to: plaintiff's employment with defendant; plaintiff's job description; job performance; job duties and job responsibilities; the organizational structure of the Business and Development and Strategy Groups; reasons plaintiff was selected for termination; the age composition of the Business Development and Strategy department; the transferring of Chris Bierbaum into plaintiff's group just prior to plaintiff's termination; reasons why Whitney Siavelis and Dan McCauley were brought into plaintiff's group immediately after plaintiff's termination; the performance evaluation of the members of plaintiff's group and the entire department; Sprint's LINK and Alpha rating systems; reasons plaintiff was not given any other Manager's position within Sprint when others within BDS were; Sprint's job search and hiring of younger individuals in positions for which plaintiff was qualified; defendant's policies and procedures; Sprint's Staff Associate Program; age bias comments by defendant's management toward older employees; and plaintiff's damages.

4. William Blessing - (Employee of Sprint)
   11708 Manor
   Leawood, KS 66211

The above individual will have knowledge of plaintiff's allegations in her Complaint, including but not limited to: plaintiff's employment with defendant; plaintiff's job

description; job performance; job duties and job responsibilities; the organizational structure of the Business and Development and Strategy Groups; reasons plaintiff was selected for termination; the age composition of the Business Development and Strategy department; the transferring of Chris Bierbaum into plaintiff's group just prior to plaintiff's termination; reasons why Whitney Siavelis and Dan McCauley were brought into plaintiff's group immediately after plaintiff's termination; the performance evaluation of the members of plaintiff's group and the entire department; Sprint's LINK and Alpha rating systems; reasons plaintiff was not given any other Manager's position within Sprint when others in BDS were; Sprint's job search and hiring of younger individuals in positions for which plaintiff was qualified; defendant's policies and procedures; age bias comments by defendant's management toward older employees; and plaintiff's damages.

5. Jo Renda - (Employee of Sprint)
   12872 Bradshaw St.
   Overland Park, KS

The above individual will have knowledge of plaintiff's allegations in her Complaint, including but not limited to: plaintiff's employment with defendant; plaintiff's job description; job performance; job duties and job responsibilities; Sprint's Succession Planning; Alpha Performance Rating Implementation; Forced Distribution; Displacement Guidelines; the organizational structure of the Business and Development and Strategy Groups; the age composition of the Business Development and Strategy department; reasons plaintiff was selected for termination;

reasons why Whitney Siavelis and Dan McCauley were brought into plaintiff's group immediately after plaintiff's termination; the performance evaluation of the members of plaintiff's group and the entire department; reasons plaintiff was not given any other Manager's position within Sprint when others in BDS were; Sprint's job search and hiring of younger individuals in positions for which plaintiff was qualified; defendant's policies and procedures; Sprint's Staff Associate Program; and plaintiff's damages.

6. Robert T Browne - (Former employee of Sprint-most likely by deposition)
   St. Louis, MO

The above individual will have knowledge of plaintiff's allegations in her Complaint; including but not limited to: plaintiff's employment with defendant; plaintiff's job description; job performance; job duties and job responsibilities; his job duties, responsibilities and job experience; his conversations with Paul Reddick concerning plaintiff, her job and performance evaluations; his observation about Reddick's preference for younger employees; plaintiff's job search; and plaintiff's damages.

7. Christopher Bierbaum - (Employee of Sprint)
   12440 Benson Street
   Overland Park, KS 66213

The above individual will have knowledge of plaintiff's allegations in her Complaint; his job duties, responsibilities and job experience; the reasons he was offered a position within BDS just prior to plaintiff's termination; the fact that

he is younger than plaintiff; the fact that jobs were found for other younger employees within Sprint; and plaintiff's damages.

8. Whitney Siavelis - (Employee of Sprint)
   14718 Outlook
   Overland Park, KS

The above individual will have knowledge of plaintiff's allegations in her Complaint; her job duties, responsibilities and job experience; the reasons she was offered a position within BDS after plaintiff's termination; the fact that she is younger than plaintiff; the fact that jobs were found for other younger employees within Sprint; and plaintiff's damages.

9. Steve Cote - (Employee of Sprint)
   4907 West 140th Terrace
   Overland Park, KS 66224

The above individual will have knowledge of plaintiff's allegations in her Complaint; her job duties, responsibilities and job experience; his working with plaintiff and Mike Bauerle; the fact that he is younger than plaintiff and he kept his job; the fact that jobs were found for other younger employees within Sprint; and plaintiff's damages.

10. Dan McCauley - (Employee of Sprint)
    14736 Maple
    Overland Park, KS

The above individual will have knowledge of plaintiff's allegations in her Complaint; his job duties, responsibilities

and job experience; the reasons he was offered a position within BDS just prior to plaintiff's termination; the fact that he is younger than plaintiff; the fact that jobs were found for other younger employees within Sprint; and plaintiff's damages.

11. John O. Ward, Ph.D. - Expert Witness
    8340 Mission Road, Suite 235
    Prairie Village, KS 66206

The above individual will have knowledge of plaintiff's damages.

12. David Mendelson
    2712 West 141st Street
    Leawood, KS 66224

The above individual will have knowledge of plaintiff's claims in her Complaint; and her damages.

13. Bonnie Hoopes - (Former employee of Sprint)
    1927 Goodman
    Overland Park, KS.

The above individual will have knowledge of plaintiff's allegations in her complaint, of plaintiff's job duties, and work performance; her own termination from Sprint; the fact that her job duties were assumed by three (3) younger individuals; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

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14. John Hoopes - (Former employee of Sprint)
    1927 Goodman
    Overland Park, KS.

The above individual will have knowledge of plaintiff's allegations in her complaint, of plaintiff's job duties, and work performance; his termination from Sprint; the fact that he was the only individual terminated in his department; that he was told he received an adverse Alpha rating; that his position job duties were assumed by a younger individual; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform; his applying for positions at Sprint after his termination and his not being called for even an interview.

15. Yvonne Wood - (Former employee of Sprint)
    13045 NW Ridgeview Drive
    Platte City, MO 64079

The above individual will have knowledge of plaintiff's allegations in her complaint, her termination from Sprint; defendant's treatment and opinions toward its older employees; her receipt of a copy of a spreadsheet from a supervisor that indicated that age, race and sex were considered in selection decisions; defendant's comments about older employees; Sprint's Staff Associate Program; defendant's comments about older employees; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

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16. Sharon Miller - (Former employee of Sprint)
907 SE 251 Road
Deep Water, MO 64740

The above individual will have knowledge of plaintiff's allegations in her complaint, her termination from Sprint; defendant's treatment and opinions toward its older employees; defendant's comments to her about older employees; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

17. John Borel - (Former employee of Sprint)
11208 West 121st Terr.
Overland Park, KS 66213

The above individual will have knowledge of plaintiff's allegations in her complaint, his termination from Sprint; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; the fact that he was given an adverse performance rating when he was told performance was not an issue; that a younger female was moved into his position after his termination; the fact that he was told by his supervisor that she was forced to give him a bad rating; that he could not get another job within Sprint because of the adverse performance rating; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

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WITNESSES WHOM PLAINTIFF MAY CALL AT TRIAL

18. James Kissinger - (Employee of Sprint) -
In person or by deposition

The above individual will have knowledge that the RIF Displacement Guidelines were mandatory and were to be followed deciding who would be RIF'd and who would stay.

19. Mark Elster - (Former employee of Sprint)

He was RIF'd at age 51 from the same organization as plaintiff. He will have knowledge of plaintiff's allegations in her complaint; his termination from Sprint; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; that a younger individual was moved into his position after his termination; that he was not offered another position within Sprint; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

20. Doug Reinhardt - (Former employee of Sprint)
15790 Linden
Overland Park, KS 66224

He was RIF'd from the same organization as plaintiff. He will have knowledge of plaintiff's allegations in her complaint; his termination from Sprint; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; that a younger individual was moved into his position after his termination; that he

was not offered another position within Sprint; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

21. Shirley Williams
    5725 Lamar
    Overland Park, KS

She was RIF'd from the same organization as plaintiff. She will have knowledge of plaintiff's allegations in her complaint; her own termination from Sprint; that she is a named plaintiff in a provisional class action against Sprint for age discrimination; defendant's treatment and opinions toward its older employees; defendant's comments about older employees; that a younger individual was moved into her position after her termination; that she was not offered another position within Sprint; defendant's hiring and firing of older employees; and the transferring and hiring of younger individuals in full-time positions older individuals are qualified to perform.

22. All witnesses listed by Defendants

23. Any and all impeachment or rebuttal witnesses

24. Records custodians, should certain records other than defendant become relevant and necessary.

APPENDIX Q — DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FINAL LIST OF POTENTIAL WITNESSES DATED DECEMBER 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-CV-02429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FINAL LIST OF POTENTIAL WITNESSES

COMES NOW Defendant Sprint/United Management Company ("Sprint"), by and through its attorneys, and in compliance with this Court's July 29, 2004, Pretrial Order submits the following objections to Plaintiff's Final List of Potential Witnesses:

GENERAL OBJECTION

Sprint objects to Plaintiff's List of Potential Witnesses in its entirety as untimely. The Pretrial Order entered by this Court on July 29, 2004, *required* final witness disclosures pursuant to Rule 26(a)(3) to be filed "no later than 20 days

before trial." This case is set for trial on January 4, 2005. All Rule 26(a)(3) witness disclosures were thus due on December 15, 2004. Without any explanation, and without leave to file out-of-time, Plaintiff did not file her list of potential exhibits until *after* the court-ordered deadline. Accordingly, Plaintiff should be precluded from calling any witness to testify who was not properly disclosed in accordance with, or otherwise allowed by the terms of, the Pretrial Order.

SPECIFIC OBJECTIONS

In the alternative, Sprint also submits its substantive objections to the specific witnesses identified by Plaintiff on her List of Potential Witnesses as follows:

I. Plaintiff Has Improperly Listed a Previously Undisclosed Witness

As Plaintiff noted in her Motion in Limine, "Federal discovery rules (and policies) *prohibit* last-minute surprises not disclosed during discovery." (Emphasis in original, citations omitted) Nevertheless, Plaintiff curiously ambushed Sprint by waiting until the last conceivable moment (indeed, after the disclosures were due) to identify a senior Sprint executive as a possible witness in this matter. Plaintiff's Final List of Potential Witnesses includes James Kissinger, Sprint's Senior Vice President of Human Resources. Despite identifying 66 individuals in her most recent voluntary disclosures pursuant to Rule 26(a)(1), *Plaintiff did not previously disclose Mr. Kissinger as a potential witness in this matter*. (Exhibit A, Plaintiff's Second Supplement [sic] Voluntary Disclosures Pursuant to Rule 26(a)(1)).

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Pursuant to Federal Rule of Civil Procedure 37(c)(1), Plaintiff should be precluded from calling Mr. Kissinger as a witness at trial. This conclusion is warranted given the Court's stern warning against untimely disclosures in its Pretrial Order. (Court Doc. No. 64, Pretrial Order, ¶12.a) ("The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)-disclosures that has not previously appeared in the initial Rule 26(a)(1)-disclosures or a timely Rule 26(e) supplement thereto; otherwise the witness or exhibit will probably be excluded at trial.") See also, *Mehus v. Emporia State University*, 326 F. Supp.2d 1213, 1218-19 (D. Kan. 2004) (testimony excluded under Rule 37(c)(1) because disclosure of witness and witnesses' purported testimony was untimely and requiring compliance with Rule 26); *Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 636, 639 (D. Kan. 2001) (sanctioning Plaintiff for failing to make timely Rule 26(a) disclosures). Plaintiff does not bother offering a reason which would rise to the level of "justifying her excusable neglect" – presumably because no such reason exists. Furthermore, Plaintiff can not meet her burden to show her failure to disclose Mr. Kissinger is harmless. Accordingly, because of her dilatory disclosure, Plaintiff should be prohibited from calling James Kissinger as a witness at trial.

II. Plaintiff's Disclosures Include Conclusory Allegations and Unfounded Opinions

Plaintiff's witness disclosures confirm she intends to proffer testimony of conclusory allegations and unfounded opinions regarding her discrimination claim, employees' performance (including her own), and employees'

qualifications (including her own). For example, Plaintiff indicates she is expected to testify about "Paul Reddick's preference for younger employees." Plaintiff can not testify regarding another's alleged state of mind. Sprint incorporates by reference, and refers the Court to its Motion in Limine and Memorandum in Support (the "Motion in Limine") regarding the propriety of Plaintiff's expected conclusory allegations, unfounded opinions, and disclosures related thereto. For all of the reasons set forth in the Motion in Limine, Plaintiff should be prohibited from offering testimony regarding Plaintiff's and others' conclusory allegations and unfounded opinions.

III. Plaintiff's Disclosures Include Issues That Were Not Previously Raised by Plaintiff

Plaintiff's disclosures assert Jim Fee, Paul Reddick, and Bill Blessing "will have knowledge" of "age bias comments by defendant's management toward older employees." However, Plaintiff has testified she is unaware of any such alleged comments attributable to Sprint's management, including Messrs. Fee, Reddick, and Blessing. (See Exhibit A to the Motion in Limine, Plaintiff's dep., pp. 159, 265.)

Plaintiff's witness disclosures also indicate Plaintiff intends to elicit testimony regarding Sprint's Staff Associate Program and Alpha Rating System. In particular, Plaintiff implies the Staff Associate Program and the Alpha Rating System have a discriminatory purpose and effect.

Sprint incorporates by reference, and refers the Court to the Motion in Limine regarding the propriety of Plaintiff's

expected proffer of testimony regarding age-based comments, the Staff Associate Program, and the Alpha Rating System. For all of the reasons set forth in the Motion in Limine, Plaintiff should be prohibited from providing testimony regarding alleged age-based comments and an alleged discriminatory purpose or effect associated with the Staff Associate Program and the Alpha Rating System.

IV. Plaintiff Has Listed Individuals Who Are Not Similarly Situated and Know Nothing About Plaintiff and/or Her Separation of Employment From Sprint

Plaintiff has disclosed six witnesses (i.e., Bonnie Hoopes, John Hoopes, Yvonne Wood, Sharon Miller, Shirley Williams and John Borel) who are allegedly expected to testify regarding their own age-discriminatory experiences at Sprint. All six of these individuals maintain their own age discrimination claims against Sprint.[1] As detailed in the Motion in Limine, which is incorporated herein by reference, Plaintiff in this case does *not* allege Sprint engaged in a pattern and practice of age discrimination. Moreover, there is simply *no* evidence Plaintiff is similarly situated with *any* of the six individuals who are pursuing their own claims against Sprint. Finally, if these witnesses are permitted to testify, this matter will be unduly confusing to the jury and prolonged with significant rebuttal testimony regarding these

1. Shirley Williams, Sharon Miller, John Borel, and Yvonne Woods have each filed their own claims against Sprint alleging a pattern and practice of age discrimination and seeking to pursue their claims as collective actions. Bonnie Hoopes and John Hoopes have filed consents seeking to opt-into the suit filed by Shirley Williams.

individuals' terminations and additional testimony regarding the separation of others under the age of 40. For all of the reasons set forth in the Motion in Limine, and the reasons set forth above, Plaintiff should be barred from presenting testimony from witnesses who are not similarly situated with Plaintiff and who claim there was a pattern and practice of age discrimination at Sprint.

V. Plaintiff's Disclosures Fail to Adequately Identify Witnesses and Their Expected Testimony

For *every* witness listed in Plaintiff's Final List of Potential Witnesses, Plaintiff states the witness has, or will have, "knowledge of plaintiff's allegations in her Complaint, including, but not limited to: . . ." Moreover, Plaintiff "discloses" "Records custodians, should certain records other than defendant [sic] become relevant and necessary." Plaintiff does nothing to identify the additional topics, documents, or records custodians referenced in her disclosures. Plaintiff's disclosures therefore fail to provide the degree of specificity required by the Pretrial Order, which dictates the parties are to "set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify." (Court Doc. No. 64, Pretrial Order, ¶12.a). Accordingly, Plaintiff should be barred from eliciting previously undisclosed subjects of testimony or calling unidentified witnesses referenced in her disclosures.

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CONCLUSION

For all of the foregoing reasons, Sprint respectfully objects to Plaintiff's Final List of Potential Witnesses.

Respectfully submitted,

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APPENDIX R — PLAINTIFF'S RESPONSES TO DEFENDANT'S OBJECTIONS TO PLAINTIFF'S LIST OF POTENTIAL WITNESSES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED DECEMBER 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

PLAINTIFF'S RESPONSES TO DEFENDANT'S OBJECTIONS TO PLAINTIFF'S LIST OF POTENTIAL WITNESSES

Plaintiff hereby files her Response to Defendant's Objections to Plaintiff's List of Potential Witnesses as follows:

Defendant's General Objection on Timeliness is Petty and Unprofessional.

As plaintiff pointed out in her Reply on Plaintiff's Motion in Limine, plaintiff filed several filings — including

her Witness List — on December 16, 2004. Defendant filed its Witness List long after business hours the night before. Plaintiff had calculated the deadlines for filings in this case the same way these same parties calculated deadlines for similar filings in a case recently tried against Sprint, *Cami Owens v. Sprint United Management*, Case No. 03-2371-JWL. This time, however, Sprint counted differently. Sprint has *not* been prejudiced in *any* way, and had time to object to Plaintiff's Witness List.

Defendant's Specific Objections

I. Defendant's objection that plaintiff has improperly listed a previously undisclosed witness is unfounded. James Kissinger, Sprint's Senior Vice President of Human Resources, was discussed throughout Jo Ella Renda's deposition that was taken in this case on February 23, 2004. Ms. Renda testified that James Kissinger was her supervisor until 2003. (Renda p. 13, line 7 - 10)

James Kissinger, in a staff meeting, told her (and others) there would be an impending reduction in 2002. (Renda p. 16, line 4 - 19) Renda went on to testify that James Kissinger was one of the individuals who authored the new LINK instructions for managers rating employees in grade 71 to 79. (Renda p. 117, line 16 - 25). There were numerous documents marked in Renda's deposition either authored by James Kissinger or received by both James Kissinger and Renda relating to the new LINK and Alpha Rating system that was to be effective in the first part of 2002. As this Court recognized in the Summary Judgment Order, improper use of the "new" Alpha Rating System, contrary to Sprint's

policies and procedures on same, is one piece of evidence on the overall issue of pretext.

Defendant has known all along that Kissinger played a large part in the Reduction-In-Force procedure that involved plaintiff, and others, even though his name was not individually listed on plaintiff's Voluntary Rule 26 Disclosures. If the court should rule that Mr. Kissinger cannot testify live at trial, then plaintiff should be allowed to read as an Admission Mr. Kissinger's testimony — given as Sprint's Rule 30(b)(6) designee — in another age case involving the RIF waves at issue here: *Williams v. Sprint*, Case No. 03-2200-JWL. Such use is expressly authorized under Rule 32 (a)(2) "for any purpose." (Fed.R.Civ.P.) Such deposition admissions also are expressly authorized under Rule 801(d)(2) to be offered as Sprint's statement of fact by Rule 30(b)(6) witness Kissinger. Finally, utter absence of any surprise or prejudice is shown by the fact plaintiff explicitly signaled the intended possible use of this deposition Admission at p. 72, fn 7 of Plaintiff's Summary Judgment Response:

> Jim Kissinger, Sprint's top HR officer, gave a Rule 30(b)(6) deposition in the *Williams* class action. There, Kissinger testified for Sprint that the RIF Displacement Guidelines are "mandatory." (Kissinger depo., 12/17/03, p. 35). Kissinger's depo. is *not* attached, since he can be called as a witness at trial in *Mendelsohn*, or his testimony can be read.

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II. Defendant objects to plaintiff's disclosures which it labels as conclusory allegations and unfounded opinions. As plaintiff stated in her Memorandum In Opposition to Defendant's Motion In Limine, Court Doc. #87, plaintiff intends to testify concerning her **personal observations** regarding Paul Reddick, rather than offer improper opinion testimony and conclusory allegations. She must be permitted to present evidence describing what she saw and observed firsthand, regarding selections made by the defendant (particularly Reddick) in promotions, demotions, and reductions-in-force. The Court must assess this subject in the full context of the trial evidence, including how and in what context it is offered.

This is an age discrimination case. Plaintiff must be allowed proper latitude to try to prove her case, by showing how she was treated compared to other younger employees; she must be allowed to testify regarding her observations of her own workload and her personal hands-on knowledge and experience in working with certain employees. Blanket pretrial prohibitions of evidence are extremely dangerous and damaging in discrimination cases, where "plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Estes v. Dick Smith Ford*, 856 F.2d 1097, 1103 (8th Cir. 1988). From all the circumstances, the jury must decide whether defendant's proffered reasons for choosing plaintiff for RIF are pretextual. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159 (10th Cir. 1998).

III. Defendant objects to plaintiff's disclosures that defendant claims were not previously raised by plaintiff.

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Defendant states that plaintiff asserts Jim Fee, Paul Reddick, and Bill Blessing "will have knowledge" of "age bias comments by defendant's management toward older employees." Defendant objects to this assertion by stating plaintiff has testified she is unaware of any such alleged comments attributable to Sprint's management. Defendant is correct that this is plaintiff's testimony, but plaintiff does not know how Jim Fee, Paul Reddick and Bill Blessing will testify until they are asked at trial.

Defendant next objects to plaintiff eliciting testimony regarding Sprint's Staff Associate Program and Alpha Rating System. As plaintiff stated in her Memorandum in Opposition to Sprint's Motion in Limine, Sprint's Alpha Rating System and Staff Associate Program most certainly may be relevant and admissible.

Sprint's Alpha Rating System most certainly will be relevant — as this Court recognized in the Summary Judgment Order. Improper use of the "new" Alpha Rating System, contrary to Sprint's policies and procedures on same, is one piece of evidence on the overall issue of pretext.[1] Plaintiff does not intend herself to offer "opinions" as to whether the Alpha Rating System or Staff Associate Program have "a discriminatory purpose or effect." (*See* Defendant's Motion In Limine, at 5). To the extent facts on those subjects properly come into play in the evidence, it will be fact-based only. The jury must make its own conclusions as to how they

1. *See* Order Denying Summary Judgment, at page 3 (dealing with the Alpha Rating System, among other subjects); and pages 5-6 (dealing with how the manipulations of the evaluation system constitutes one prong of the evidence going to pretext).

view such pieces of evidence in the context of *all* evidence and inferences derived therefrom. Rule 401 defines "relevant evidence" as meaning: "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Plaintiff's evidence on these subjects meets the test of Rule 401, and must be considered and weighed by the Court in the context of trial.

IV. Defendant objects to plaintiff listing individuals whom defendant claims are not similarly situated and know nothing about plaintiff and/or her separation of employment from Sprint. As plaintiff set forth in her Opposition to Defendant's Motion in Limine, Tenth Circuit law is solidly *against* defendant. *Minshall v. McGraw Mill Broadcasting Company, Inc.*, 323 F.3d 1273 (10th Cir. 2003) at 1285; *Spulak v. K-Mart Corporation*, 894 F.2d 1150 (10th Cir. 1990); *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991); *Greene v. Safeway Stores, Inc., supra*, 98 F.3d 554, at 561. Plaintiff worked in Business Development, which is a department within the Sprint PCS division. Exhibits 3 and 4 which are Succession Planning documents are entitled "PCS Succession Planning." Plaintiff listed witnesses who also worked in Sprint PCS and were terminated in the same time-frame as she was, also as part of a RIF. For the reasons stated in plaintiff's Opposition to Defendant's Motion In Limine, defendant's objections to prohibiting evidence from other employees terminated in Sprint's PCS reduction-in-force under similar circumstances as plaintiff must be denied. See also *Estes*, supra, (evidence showing "history and work practices" probative of a climate of age and race discrimination must be admitted); *Phillips v. ANR Freight*,

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945 F.2d 1054, 1056-57 (8th Cir. 1991) (Other complaints of age discrimination should have been "freely admitted at trial.")

V. Defendant objects by stating plaintiff's disclosures fail to adequately identify witnesses and their expected testimony. Defendant points out that plaintiff listed as a potential witness: "records custodians, should certain records other than defendant become relevant and necessary." This listing is for rebuttal and/or impeachment purposes only. Therefore, plaintiff cannot contemplate the subject matter of the expected testimony or provide a brief synopsis of the substance of the facts to which the witness is expected to testify, until such time rebuttal and/or impeachment of defendant's witnesses would be necessary.

WHEREFORE, for the foregoing reasons, defendant's objections to Plaintiff's Final List of Potential Witnesses should be denied.

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ATTORNEYS FOR PLAINTIFF

APPENDIX S — EXCERPTS FROM TRIAL TRANSCRIPT DATED JANUARY 4, 2005

* * *

MR. MONAFO: YOUR HONOR, EXHIBIT 4 IS A COMPILATION OF VARIOUS DIFFERENT DOCUMENTS. I THINK WE -- I DON'T THINK IT CAN BE TAKEN AS A BIG GROUP OF EXHIBITS LIKE THIS. SO I WOULD HAVE AN OBJECTION TO -- THERE'S SOME SPREADSHEETS IN HERE THAT HAVE INFORMATION, FOR EXAMPLE, THAT WOULD BE BARRED UNDER SOME OF THE PRETRIAL ORDERS. IF HE'S GOT A PARTICULAR DOCUMENT --

MR. EGAN: I DON'T KNOW WHAT HE'S TALKING ABOUT ITS BARRED BY THE PRETRIAL ORDER.

MR. MONAFO: IT APPEARS TO BE.

ME. EGAN: MAY WE APPROACH?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD BETWEEN COURT AND COUNSEL AT THE BENCH OUTSIDE THE HEARING OF THE JURY:)

MR. MONAFO: YOUR HONOR, THE OBJECTION IS EXHIBIT 4 IS A GROUP OF DOCUMENTS THAT SOME OF THEM ARE SUCCESSION PLANNING, SOME OF THEM ARE ACTUALLY FROM THE RIF. IT'S A COMPILATION OF VARIOUS THINGS. THERE'S SOME SPREADSHEETS IN HERE THAT CONTAIN DATES OF BIRTH, FOR EXAMPLE, RACE, AGE OF PEOPLE WHO I THINK, BY VIRTUE OF THE PRETRIAL ORDER -- OR

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EXCUSE ME, THE MOTION IN LIMINE ORDER, THEY'RE NOT SIMILARLY SITUATED.

IF THEY COME INTO EVIDENCE THE JURY COULD HAVE THEM BACK IN DELIBERATIONS AND THEY WOULD BE CONSIDERING AGES AND THINGS OF THAT NATURE THAT THEY SHOULDN'T EVEN CONSIDER. SO THAT'S ONE OF THE MY CONCERNS, CERTAINLY ON THE SPREADSHEET.

BUT THEY SAID THERE'S A GROUP -- THIS IS A GROUP OF DOCUMENTS THAT DIFFERENT PEOPLE CREATED SO I THINK THE FOUNDATION NEEDS TO BE LAID THROUGH DIFFERENT WITNESSES.

MR. EGAN: YOUR HONOR, MY --

THE COURT: FIRST OF ALL, I DON'T THINK THAT I EVER RULED THAT THE JURY CAN'T KNOW ANY AGES OR RACES OR NAMES OF OTHER PEOPLE.

MR. MONAFO: CORRECT.

THE COURT: SO WHAT THE MOTION IN LIMINE GOES TO IS THE ARGUMENT THAT THE PLAINTIFF MAY ARGUE AS TO ADVERSE TREATMENT OF THESE OTHER PEOPLE BECAUSE OF THEIR AGE. SO AS LONG AS THIS IS JUST GOING IN AS BACKGROUND INFORMATION, I DON'T SEE WHAT CONCEIVABLE INFERENCE THE JURY CAN DRAW FROM IT. THAT'S NUMBER ONE.

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NUMBER TWO, I THINK YOU ALL STIPULATED THEY'RE BUSINESS RECORDS AND THEY'RE ADMISSIBLE SUBJECT TO -- ONLY TO OBJECTIONS AS TO RELEVANCE

MR. EGAN: YES, YOUR HONOR.

THE COURT: I BELIEVE THAT'S IN THE PRETRIAL ORDER. SO IF YOUR OBJECTION JUST GOES TO FOUNDATION --

MR. MONAFO: WELL, YOUR HONOR, I THINK THE MAIN THING THAT CAUGHT MY EYE IN THE SPREADSHEETS IS THAT THEY'VE GOT -- THERE IS VARIOUS ORGANIZATIONAL CHARTS THAT IF THE JURY LOOKED AT -- THEY HAD ALL THIS BACK IN THE ROOM, THEY WOULD BE ABLE TO PIECE TOGETHER THAT SOMEBODY WAS PART OF THE RIF AND GET THEIR AGES AND SOMEBODY WHO PAUL REDDICK HAD NO DECISION-MAKING AUTHORITY OVER. THAT'S MY CONCERN.

MR. EGAN: YOUR HONOR, MAYBE WE BETTER VISIT ABOUT THAT. YOU KNOW, AS YOU RECOGNIZED IN YOUR ORDER, THE DECISIONS TO MAKE THE RIFS IN THE BDS ORGANIZATION WERE MADE BY BLESSING AND REDDICK AND THAT IS THE FACT.

AS FAR AS MY BEING ABLE TO BRING IN OTHER EMPLOYEES TO TESTIFY AS TO HOW THEY WERE TREATED, YOUR RULING CLEARLY SAYS THEY

WOULD HAVE TO HAVE BEEN SUPERVISED BY PAUL REDDICK, SO I UNDERSTAND THAT ASPECT OF IT. JUST SO THE COURT'S AWARE, THESE DOCUMENTS ARE ALL WERE USED BY HR, THEY WERE DOCUMENTS, AS SHE'S TESTIFIED, THAT WERE USED AS TOOLS TO DECIDE HOW THEY MAKE THE CUTS.

WE'VE ALREADY HEARD FROM MS. MILLER IN OPENING STATEMENT THAT OTHER PEOPLE LOST THEIR JOBS FROM BDS, SO IT'S CERTAINLY, YOU KNOW, PART OF THE EVIDENCE IN THIS CASE THAT I EXPECT THE DEFENDANT WOULD WANT TO USE THAT OTHER PEOPLE RECEIVED RIFS AND SO THEY JUST -- YOU KNOW, THEY DON'T GET TO AVOID THE FACT THAT THIS IS AN AGE CASE, THIS IS ALL THEIR DOCUMENTS THAT WERE USED DURING THE RIFS AS THE TOOLS TO GET DOWN TO THE CUTS THAT WERE MADE. IT'S ALL RELEVANT TO THIS CASE.

THE COURT: IS IT ONE, A SINGLE DOCUMENT, OR HAVE YOU PUT TOGETHER A GROUP OF DOCUMENTS?

MR. EGAN: WE MARKED THEM AS THEY WERE PRODUCED TO US. IT'S A SERIES OF DOCUMENTS THAT ALL OF THEM RELATE TO THIS BDS GROUP. MANY OF THEM RELATE TO SUCH THINGS AS -- AND THEY'VE BEEN MIXED TOGETHER. YOU KNOW HOW IT IS SOMETIMES IN THESE CASES, THEY'RE -- YOU KNOW, THE DEFENDANT -- I'M NOT CRITICAL, BUT IT'S JUST THE WAY IT'S PRODUCED TO US. SO WE

WANTED TO AVOID PUTTING IT IN OUT OF ORDER SO WE MARKED THEM THAT WAY AND WILL ASK WITNESSES ABOUT THEM, EVERY ONE OF THEM HAS BEEN -- YEAH.

MR. MONAFO: THERE'S NO DISPUTE ABOUT THAT.

MR. EGAN: WELL, I MEAN THE POINT IS THEY'RE PRODUCED AS SPRINT 435 THROUGH 467, ET CETERA, THERE'S ORGANIZATIONAL CHARTS THAT WILL BE RELEVANT FOR VARIOUS WITNESSES. THEY'RE ALL GOING TO COME IN AS UNCONDITIONALLY RELEVANT BECAUSE MOST OF THESE HAVE HANDWRITING BY BILL BLESSING THAT JO RENDA WORKED WITH HIM ON THE CUTS THAT ARE MADE. SO, YES, I APOLOGIZE THAT THEY ARE, UNFORTUNATELY, A GROUP OF DOCUMENTS.

THE COURT: WHY DON'T YOU OFFER THEM LIKE BREAK IT DOWN TO DISCRETE DOCUMENTS, HAVE IT MARKED DOWN TO 4A, 4B, 4C AND DEAL WITH THEM ONE BY ONE.

MR. EGAN: I CAN TRY. IT JUST TAKES LONGER TO DO. I'M TRYING TO BE -- I WANT TO USE THE WORD EFFICIENT.

THE COURT: IF THESE ARE ALL COMING IN --

MS. MILLER: I DON'T HAVE ANY INTENTION TO FORCE HIM TO DO SOMETHING THAT'S GOING TO MAKE IT INEFFICIENT. IF THIS ALL JUST CAME IN,

THERE ARE A BUNCH OF PEOPLE ON THESE LISTS THAT REDDICK HAD NOTHING TO DO WITH. THEY WERE PART OF THE RIF. AND IF THEY HAD ALL THIS INFORMATION, MY CONCERN IS IT WOULD BE BACK THERE, THEY'LL GO GET ALL THE INFORMATION THAT THE ORDER DID EXCLUDE.

MR. EGAN: I FULLY AGREE IF WE LET THIS COME IN THEY'RE GOING TO GET A BUNCH OF NAMES OR A BUNCH OF DIFFERENT PEOPLE, BUT NOT PEOPLE WHO ARE NOT SIMILARLY SITUATED. THEY ARE NOT GOING TO BE THE DISCRIMINATED. YOU'RE THE ONE THAT'S SAYING IT'S A RIF AND YOU'RE SAYING IT'S A LEGITIMATE, NONDISCRIMINATORY RIF. SO I DON'T SEE HOW YOU CAN POSSIBLY PROVE THAT IF YOU ONLY LET IN EVIDENCE -- THE RIF AFFECTED MORE THAN THE PEOPLE IN PLAINTIFF'S GROUP.

MR. MONAFO: ABSOLUTELY.

THE COURT: SO YOU CAN'T HAVE IT BOTH WAYS.

MR. MONAFO: I WAS TRYING TO DRAW THE LINE IS JUST THAT, YES, THERE WAS A RIF. YES, IT WAS BIGGER THAN HER GROUP, IT WAS THE WHOLE PCS BUSINESS UNIT. BUT WE'RE NOT GOING TO GO THROUGH THE DEMOGRAPHICS OF EVERYBODY IN THE PCS BUSINESS UNIT. WE'RE GOING -- ONLY GOING TO FOCUS -- HONE IN ON PAUL REDDICK, THAT WAS MY UNDERSTANDING OF THE MOTION

IN LIMINE ORDER. THE ONLY PEOPLE THAT PLAINTIFF CAN COMPARE HERSELF TO ARE THE PEOPLE WHO SHE WAS SIMILARLY SITUATED TO.

MR. EGAN: YOUR HONOR, I DO NOT UNDERSTAND THAT TO BE THE COURT'S RULING. WHAT THE DEFENDANT WANTED US TO DO WAS KEEP OTHER EMPLOYEES FROM OTHER AREAS, NOT THE BDS GROUP. FOR INSTANCE, THERE'S A GENTLEMAN NAMED MARC ELSTER AND WE COVERED ALL THIS IN THE SUMMARY JUDGMENT ORDER. HE WAS 51, HE WAS TERMINATED BY BLESSING AS PART OF THIS. THERE'S REINHARDT, THERE'S VARIOUS PEOPLE. OF COURSE, THEY USE IT AS TOOLS, THAT'S THE WAY THEY GOT DOWN TO THE CUTS. THAT'S SOMETHING THAT THE JURY HAS A RIGHT TO KNOW AND PIECE TOGETHER.

AND I'M SURE THEY WILL ATTACK ELLEN MENDELSOHN, SHE'S A BAD PERFORMER, WE THINK IT'S AGE, WE HAVE TO BE ABLE TO SHOW WHAT THE COMPARATIVE AGES ARE. I CAN TRY AND PIECE IT TOGETHER, BUT HONESTLY IT IS TOUGHER TO DO. I WILL DO MY BEST TO DO IT AS I GO THROUGH WITH THIS WITNESS.

MR. MONAFO: WELL, IF -- LIKE I SAID, MY MAJOR CONCERN -- REALLY MY OBJECTION IS TO THE SPREADSHEET.

MR. EGAN: I AM GOING TO ASK HER ABOUT THE SPREADSHEETS. THEY ARE SPECIFIC ABSOLUTE TOOLS THAT SHE USED.

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MR. MONAFO: PUTTING THAT ACTUAL SPREADSHEET INTO EVIDENCE WITH THE AGES ON THERE OF PEOPLE WHO ARE NOT SIMILARLY SITUATED, THAT'S MY --

MR. EGAN: SPRINT HAS DOCUMENTS THAT SHOW AGES IN AN AGE CASE. THE FACT THAT SPRINT SHOWS AGES IN AN AGE CASE IS RELEVANT IN ITSELF. WE CAN TALK TO THE WITNESS AND I'LL DRAW OUT FROM HER HOW IT WAS USED, BUT DOCUMENTS SHOWING INDIVIDUALS AND DEMOGRAPHIC INFORMATION IS ABSOLUTELY RELEVANT.

MR. MONAFO: AND JUST TO UNDERSTAND, I DON'T OBJECT, I KNOW I INTEND TO BRING IT OUT MYSELF, BUT SHE HAD SPREADSHEETS WITH THE PEOPLE'S AGES ON IT, HOW ELSE COULD SHE DO HER JOB? BUT MY OBJECTION IS THE PEOPLE SHOULD NOT LEARN THE ACTUAL AGES OF A BUNCH OF PEOPLE WHO ARE NOT SIMILARLY SITUATED TO THE PLAINTIFF. I THINK ONLY THE PEOPLE WHO WERE SIMILARLY SITUATED, THOSE ARE THE AGES OF THE RELEVANCE.

THE COURT: I THINK WE'RE GOING TO NEED TO DEAL WITH THIS ON AN EXHIBIT-BY-EXHIBIT BASIS, BUT I THINK YOU MAY BE OVEROPTIMISTIC IN SAYING YOU'RE GOING TO ELICIT TESTIMONY THAT AGE WAS PART OF WHAT THEY COULD CONSIDER, BUT NOT LET THE JURY SEE THE DOCUMENTS THAT OUTLINE WHAT THE AGES ARE.

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I THINK MAYBE YOU'RE BEING A LITTLE OVERSENSITIVE TO SOME OF THIS EVIDENCE BECAUSE THE JURY -- IT'S -- I BELIEVE IT'S CLEAR TO THE JURY NOW, IF IT'S NOT CLEAR NOW, IT CERTAINLY WILL BE CLEAR AT THE END OF THE CASE, THAT THEY'RE ONLY CALLED UPON TO EVALUATE WHETHER SPRINT DISCRIMINATED AGAINST THIS PLAINTIFF AND PLAINTIFF WILL ONLY BE ALLOWED TO ARGUE. IF THERE'S ARGUMENT, ABOUT HOW OTHER EMPLOYEES WERE TREATED, THAT THEY HAVE TO BE EMPLOYEES WHO WERE SIMILARLY SITUATED SUBJECT, TO THE SAME DECISION-MAKER AND THE SAME RIF. I DON'T BELIEVE THAT I CAN SAY ANYTHING ELSE AT THIS POINT.

* * *

ME. EGAN: YOUR HONOR, BECAUSE I JUST WANT THIS TO GO SMOOTHER THAN IT DID YESTERDAY, I'M GOING TO MAKE ANOTHER SHOT AT EXHIBIT 4.

THE COURT: OKAY.

MR. EGAN: AND MAYBE JUST EXPLAIN A LITTLE BIT WHERE I WANT TO GO WITH THAT SO THAT YOU KNOW AS THIS COMES UP. EXHIBIT NUMBER 4 HAS BEEN IDENTIFIED IN DISCUSSIONS BETWEEN ME AND MR. MONAFO AS BEING MISS RENDA'S FILE. THAT'S HOW IT'S BEEN DESCRIBED TO ME, JIM. IS

THERE ANY DISTINCTION THAT YOU KNOW OF FROM THAT?

MR. MONAFO: THAT'S FINE.

MR. EGAN: OKAY. SO IT'S GOT DOCUMENTS IN THERE THAT SHE USED IN CONDUCTING HER HR HELP AND COUNSEL OF BDS IN THE ENTIRETY OF THIS RIF. IT'S ALL HER STUFF THAT SHE HAD. IT IS RELEVANT TO THE CASE. I WOULD LIKE TO BE ABLE TO OFFER IT IN EVIDENCE AND I WILL GO THROUGH EACH PAGE THAT HAS HER HANDWRITING ON IT, THE EXCEL SPREADSHEETS THAT SHE USED AS A TOOL TO HELP HER AS SHE'S HAVING ONGOING DISCUSSIONS, SHE'S TESTIFIED, WITH BLESSING AND REDDICK BOTH, THAT IT'S BLESSING'S ORGANIZATION, THAT IT HAS TO BE CUT AND THAT HE AND REDDICK, BECAUSE BLESSING DELEGATED SOME AUTHORITY TO REDDICK, ARE DOING THESE CUTS.

SO I WOULD LIKE TO BE ABLE TO USE THESE DOCUMENTS WITHOUT STOPPING IN EACH ONE AND SAYING, THIS IS 4C OR 4F OR -- BECAUSE I'M GOING TO JUMP BACK AND FORTH A LITTLE BIT AND THE RECORD IS GOING TO GET KIND OF CRAZY. IT'S ALL RELEVANT.

IN OPENING STATEMENT MS. MILLER SAYS THAT PAUL REDDICK LOOKED AT THE ENTIRE

ORGANIZATION, THE ENTIRE ORGANIZATION HAS RIFS, WE'VE ALWAYS UNDERSTOOD THAT'S PART OF THIS CASE THE BACKGROUND OF THIS CASE. SO I WOULD LIKE TO BE ABLE TO OFFER EXHIBIT 4 IN EVIDENCE, GO OVER THE DOCUMENTS WITH HER. SHE EXPLAINS ALMOST EVERYTHING, BUT IT'S ALL RELEVANT TO THE CASE.

THE COURT: OKAY.

MR. MONAFO: AND, YOUR HONOR, MY OBJECTION REALLY WAS TO ONE DOCUMENT IN THERE, WHICH IS THE SPREADSHEET AND I -- I DON'T CARE THAT -- THE EVIDENCE OF THE SPREADSHEET I THINK IS FINE. REALLY IT SHOULD JUST BE REDACTED TO TAKE THE AGES OFF THIS -- OFF THE SPREADSHEET IF THEY WANT TO ACTUALLY ENTER IT INTO EVIDENCE.

THE OBJECTION THAT I STATED YESTERDAY WAS THAT IN ORDER TO COMPLY WITH THE MOTION IN LIMINE ORDER, IT'S MY UNDERSTANDING THAT WE'RE ONLY TALKING ABOUT PAUL REDDICK'S DECISIONS. AND PLAINTIFF IS ONLY ENTITLED TO PROVE DISCRIMINATION BY LOOKING AT OTHER EMPLOYEES WHO WERE SIMILARLY SITUATED WITH HER. THE SPREADSHEET CONTAINS NUMEROUS PEOPLE WHO WERE NOT SIMILARLY SITUATED TO HER.

AND IF IT GOES INTO EVIDENCE WITH THE ORG CHARTS, THE JURY WILL HAVE ALL THE

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INFORMATION THEY NEED TO DRAW INAPPROPRIATE CONCLUSIONS ABOUT THE RIF.

THE COURT: WHY CAN'T WE JUST TAKE CARE OF THIS BY TELLING THE JURY THAT THERE'S NO CLAIM IN THIS CASE THAT THE RIF ITSELF WAS INHERENTLY DISCRIMINATORY ON THE BASIS OF AGE AND THAT THEY SHOULDN'T DRAW ANY INFERENCE -- THEY SHOULDN'T TRY AND MAKE ANY CALCULATIONS, DRAW ANY INFERENCE FROM THE AGES WHICH ARE REFLECTED ON THAT SPREADSHEET BECAUSE THAT'S NOT PART OF THE ISSUES IN THIS CASE.

MR. MONAFO: I THINK THE SAFER WAY TO DO IT WOULD BE TO MAKE SURE THEY DON'T EVEN GET THE AGE INFORMATION OF THE PEOPLE WHO WERE NOT IN PAUL REDDICK'S WORLD. THAT, TO ME, WOULD BE THE SAFE WAY TO DRAW THE LINE. THESE PEOPLE WERE NOT IN REDDICK'S ORGANIZATION, THEY'RE NOT SIMILARLY SITUATED. THEIR AGES ARE NOT RELEVANT, THEREFORE, TO ANY ISSUES IN THIS CASE.

THERE COULD BE NO CONCEIVABLE WAY THE AGE COULD BE RELEVANT OTHER THAN TO SHOW DISCRIMINATION. AND THAT'S OUR CONCERN. OUR CONCERN IS THAT IF THE AGES COME IN, THEN THE JURY -- IT'S GOING TO BE A NATURAL INCLINATION FOR THEM TO TRY TO DRAW THEIR OWN CONCLUSIONS BACK THERE THAT -- I DON'T THINK

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THE INSTRUCTION FROM THE COURT WOULD PROTECT SPRINT'S RIGHTS SUFFICIENTLY, SO I GUESS THAT WOULD BE MY CONCERN.

THE COURT: I DON'T THINK IT'S REASONABLE TO ASSUME THAT THE COURT WILL DISREGARD OR THAT THE JURY WILL DISREGARD THE COURT'S INSTRUCTIONS. BUT MR. EGAN?

MR. EGAN: YES, YOUR HONOR.

THE COURT: EXCUSE ME. FRANKLY, I HAVE A PROBLEM WITH GOING IN AND REDACTING A LOT OF DOCUMENTS BECAUSE IT FOCUSES THE JURY'S ATTENTION ON EXACTLY WHAT YOU'RE TRYING TO GET THE JURY TO DISREGARD AND I DON'T THINK THAT'S A VERY SMART WAY OF APPROACHING IT.

MR. MONAFO: YEAH, OUR OBJECTION IS SIMPLY TO THE SPREADSHEET, SO THE REST OF THE EXHIBIT --

THE COURT: I UNDERSTAND, BUT YOU WOULD HAVE TO GO INTO THAT SPREADSHEET AND DRAW A BLACK MAGIC MARKER THROUGH EVERY PLACE THAT SHOWS AN AGE, WHICH IS GOING TO MAKE THE JURY LOOK AT THAT AND GO, WHAT IS IT THAT THEY'RE TRYING TO KEEP US FROM FINDING OUT? AND SO THEN IF I SAY THAT'S NOT PART OF THE ISSUES IN THE CASE, THEN THEY'RE SUSPICIOUS ABOUT MY INSTRUCTION.

MR, EGAN?

MR. EGAN: YES, YOUR HONOR. JUST SOME MORE OBSERVATIONS ABOUT THAT. IN THIS CASE THE DEFENDANT -- AND I DON'T MEAN TO POINT FINGERS. THIS IS THE RESULT OF THE ADVOCACY AND ADVERSARY PROCESS. THE DEFENDANT WANTS TO TAKE THE FACTS OF THE CASE AS THEY DEVELOP THE RIF AND THEN SIMPLY REDACT THINGS OUT WHEN INDEED THIS IS AN AGE DISCRIMINATION CASE.

WE HAVE HAD TESTIMONY SO FAR FROM MISS RENDA THAT I ASKED WHO WOULD BE THE INCUMBENTS THAT SHE'S COMPARED WITH? WELL, SHE HAS ALREADY STATED WHAT I BELIEVE TO BE TRUE AND THAT WOULD BE SHE COULD BE COMPARED WITH ALL INCUBATOR GROUPS. AND THAT IS -- SHE IS RIGHT ABOUT THAT. IN OTHER WORDS, IT'S NOT JUST THAT REDDICK MAKE DECISIONS, REDDICK MADE DECISIONS THAT AFFECT AND RESULTED IN MISS MENDELSOHN LOSING HER JOB.

SO DID BILL BLESSING IN CONJUNCTION WITH HIM, BUT IT'S THE CUTS OF THE ORGANIZATION. SHE HAD THE OPTION TO FIND OTHER JOBS. THEY HAVE THE OPTION TO FIND JOBS FOR HER. THE AGES OF PEOPLE WHO KEPT JOBS IS RELEVANT AS PART OF THE OVERALL CONTEXT OF THIS AGE DISCRIMINATION CASE.

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NOT THAT THE JURY IS GOING TO GO -- I MEAN, I THINK REALLY THEY SHOULD BE ALLOWED TO SEE WHAT SPRINT USED AS THE TOOLS AS THEY'RE GOING THROUGH THIS, PARTICULARLY THE HR FOLKS WHO, PURSUANT TO THE DISPLACEMENT GUIDELINES, ARE TO REVIEW THE PLANNED DISPLACEMENTS AND DO A DISPARATE IMPACT ANALYSIS. THAT'S IN EVIDENCE.

I'M SIMPLY TRYING TO PROVIDE THE CONTEXT FOR THE JURY. I'M NOT EVEN SURE THAT YOU NEED A LIMITING INSTRUCTION BECAUSE IT MAY OVERLY RESTRICT WHAT THE CONTEXT AND THE TOTALITY OF THE RELEVANT CIRCUMSTANCES IS IN THIS AGE CASE. BUT, YOU KNOW, AS A FALL-BACK POSITION, IF THERE IS SOME KIND OF REASONABLE LIMITING INSTRUCTION, YOU KNOW, I CERTAINLY WOULD CONSIDER IT.

BUT I REALLY DON'T THINK IT'S NECESSARY. IT'S JUST THAT THE DEFENDANT WANTS TO NOW TRY AND CONSTRICT AND TAKE YOUR ORDER AND CONTORT IT FAR BEYOND WHAT I THINK WAS INTENDED. IT WAS BASED ON IF WE WERE GOING TO CALL OTHER EMPLOYEES WHO WERE CLAIMING HOW THEY WERE TREATED DISCRIMINATORILY. AND YOU SAID NO THEY SHOULD BE UNDER THE SAME -- YOU KNOW, SAME OR SIMILARLY SITUATED, MEANING UNDER PAUL REDDICK. NOW IT'S EXPANDED, THAT ANYTHING HAVING TO DO WITH AGES IS TO BE KEPT OUT OF THIS CASE AND I DON'T THINK THAT'S TRUE.

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MR. MONAFO: YOUR HONOR, IF I MAY.

THE COURT: UH-HUH.

MR. MONAFO: THAT IS NOT OUR INTENTION. OUR INTENTION IS TO CONFINE THE PLAINTIFF TO COMPARING HERSELF TO OTHER INDIVIDUALS WHO ARE SIMILARLY SITUATED. THE DANGER IS IF SHE GOES OUTSIDE THE SIMILARLY SITUATED DEFINITION, SHE IS NOW INTO A PATTERN AND PRACTICE CASE, AND THEY ARE GOING TO BE ARGUING -- OR SHOWING THAT THE -- ARGUING THAT THE RIF IN AND OF ITSELF WAS DISCRIMINATORY.

THE COURT: I THINK THE QUESTION IS WHETHER THE RIF WAS A PRETEXT FOR AGE DISCRIMINATION. AND THE REASON I OVERRULED YOUR MOTION FOR SUMMARY JUDGMENT WAS BECAUSE THERE WAS, I THOUGHT, SUFFICIENT EVIDENCE IN THE RECORD THAT SPRINT DIDN'T FOLLOW ITS OWN PROCEDURES. I THINK THAT MAKES THE WHOLE PROCESS, YOU KNOW, FAIR GAME, WHAT WAS THE PROCEDURE AND WAS IT FOLLOWED? AND IF THIS SPREADSHEET WAS USED AS PART OF THE IMPLEMENTATION OF THE RIF AND IT HAS AGES ON IT, THEN I THINK THAT IT'S FAIR GAME FOR THE JURY.

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MR. MONAFO: THE OBJECTION IS, YOUR HONOR, THESE ARE -- THIS WOULD BE EVIDENCE OF DECISIONS THAT WERE NOT MADE BY PAUL REDDICK. COUNSEL STATED IN HIS OPENING STATEMENT, WHICH IS AN ADMISSION, THAT PAUL REDDICK MADE THE DECISION ON PLAINTIFF.

THE COURT: I'M AFRAID THAT YOU DON'T REALLY COMPREHEND WHAT I WAS SAYING IN THE MOTION IN LIMINE -- OR ON THE MOTION IN LIMINE. IT WAS NEVER MY INTENT TO PRECLUDE PLAINTIFF FROM PUTTING ON EVIDENCE ABOUT THE RIF, HOW IT WORKED, WHETHER SPRINT FOLLOWED ITS OWN RIF PROCEDURES, ET CETERA. I THINK BECAUSE OF THE FACTUAL BACKGROUND OF PLAINTIFF'S CLAIM, WE HAVE TO GET INTO WHAT HAPPENED TO OTHER EMPLOYEES.

MR. MONAFO: I UNDERSTAND THAT NOW, YOUR HONOR, THAT I -- WE WERE JUST -- THE WAY WE INTERPRETED THE ORDER WAS THAT IT WOULD ONLY -- THE ONLY FAIR GAME WAS PEOPLE THAT WERE SIMILARLY SITUATED TO PLAINTIFF AND THOSE WERE THE DECISIONS MADE BY PAUL REDDICK AND THOSE WERE THE RELEVANT DECISIONS. SO THAT'S THE WAY WE INTERPRETED THE ORDER.

THE COURT: AS I UNDERSTOOD THE MOTION IN LIMINE, YOU WERE ASKING ME TO PREVENT, FOR EXAMPLE, PLAINTIFF FROM TESTIFYING THAT SPRINT TREATED OTHER PEOPLE UNFAIRLY ON THE BASIS OF AGE.

MR. MONAFO: CERTAINLY.

THE COURT: YOU WANTED THE COURT TO PROHIBIT OTHER EMPLOYEES, SUCH AS OUR POTENTIAL JUROR, FROM COMING IN AND SAYING, I WAS RIF' D, IT WAS BECAUSE OF MY AGE AND THAT SORT OF THING. SO THAT'S WHERE I WAS TARGETING MY RULING. AND I STAND BY THAT RULING. I DON'T WANT THAT KIND OF EVIDENCE TO COME IN.

BUT I THINK THAT'S A TOTALLY DIFFERENT QUESTION FROM THE QUESTION WHETHER THE RIF, WHICH IS YOUR STATED NONDISCRIMINATORY REASON, IS A PRETEXT FOR AGE DISCRIMINATION. SO CAN WE GO AHEAD AND ADMIT ALL OF EXHIBIT 4?

MR. EGAN: YES. THAT WOULD BE MY MOTION TO ADMIT EXHIBIT 4.

MR. MONAFO: THEY WERE JUST -- WE IDENTIFIED MARC ELSTER AS I THINK HE JUST RAISED MARC ELSTER AND DOUG REINHARDT, THOSE WERE SPECIFIC INDIVIDUALS WE MENTIONED BY NAME IN OUR MOTION IN LIMINE SO THAT'S HOW WE INTERPRETED THE ORDER, JUDGE. THAT'S ALL I WANTED TO LET YOU KNOW. AND WE UNDERSTAND WHERE YOU'RE AT NOW.

THE COURT: OKAY. SO CAN WE GO AHEAD AND ADMIT EXHIBIT 4?

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MR. MONAFO: OVER MY OBJECTION? I MEAN, I WANT TO MAKE MY OBJECTION.

THE COURT: RIGHT. YOU'VE MADE YOUR OBJECTION AND THE COURT WILL RECEIVE EXHIBIT 4.

* * *

(WITNESS: JO RENDA)

Q. BEFORE I MOVE ON TO THAT LET ME ASK ABOUT THIS LANGUAGE. FUNCTIONS OR POSITIONS TO BE ELIMINATED. WE'LL GET INTO IT IN A LITTLE MORE DETAIL, BUT THERE ARE PEOPLE WHO WERE IN BILL BLESSING'S ORGANIZATION WHO HAD WHAT WAS DESCRIBED TO YOU AS A FUNCTIONAL RIF. IN OTHER WORDS, THE FUNCTION THEY WERE DOING WAS GOING AWAY, CORRECT?

A. CORRECT.

Q. AND THAT WAS SOMEONE -- FOR INSTANCE, THE JURY WILL SEE THE NAME DOUG REINHARDT ON SOME ORGANIZATIONAL CHARTS, THE FUNCTION THAT HE WAS DOING IN HIS GROUP, ACCORDING TO WHAT BILL BLESSING WAS TELLING YOU, WOULD BE GOING AWAY?

A. IN BILL BLESSING'S GROUP, YES, IT WAS A DUPLICATION OF FUNCTIONS PERFORMED BY ANOTHER DIVISION.

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Q. NOW THIS DOCUMENT ALSO LISTS -- AND I'M GOING TO FOCUS ON THE BOTTOM OF IT -- NAMES OF EMPLOYEES. AND AT THE VERY BOTTOM FROM THE NAME CARRITHERS, MENDELSOHN, KENNEDY, I'M LOOKING AT THE LEFT-HAND SIDE, MARC ELSTER, VICKIE WALTON, DOUG REINHARDT, FRANCIS DEBLAUWE, THOMAS CROUCH, SANJAY VERMA. THESE PEOPLE ARE ALL LISTED -- AS IF I CAN FOCUS IN A LITTLE BETTER -- RIF, R I F F -- EXCUSE ME, R I F. I'M SORRY.

MR. MONAFO: CAN I JUST HAVE AN OBJECTION ON THE GROUNDS OF RELEVANCE TO ANY DECISION NOT MADE BY PAUL REDDICK. AND MAYBE IT WOULD BE EASIER IF I JUST HAD A RUNNING OBJECTION TO THAT SO I DON'T HAVE TO INTERRUPT.

THE COURT: OKAY.

A. AND THERE'S A PAGE 2 AS WELL.

Q. (BY MR. EGAN) YES.

A. BUT YES.

Q. AND I'LL PUT PAGE 2 UP. IT'S A LITTLE HARDER TO READ BECAUSE IT WAS IN SOME KIND OF COLOR AND I'LL HAVE TO LET THE MACHINE FOCUS. THERE'S SOME NAMES LIKE JANET DAVIS, CARL ATWELL, NATALIE O'BANNON, DEBORAH LAW, DEBORAH HAMLIN, TERESA DODSON. AND

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THESE OTHERS ARE A STRAIN AND I'M GOING TO DO MY BEST AND YOU TELL ME IF YOU AGREE WITH IT. MARY CREASON. THE NEXT ONE I JUST CAN'T READ.

A. BRIAN FELD(PH).

Q. AND THE LAST ONE?

A. I CAN'T READ THAT ONE EITHER. THOSE THREE, THERE WAS A RUNNING QUESTION ON WHETHER THEY WERE TO BE INCLUDED IN BILL BLESSING'S ORGANIZATION OR NOT AS PART OF THIS REDUCTION.

Q. JUST SO WE CAN FOCUS ON WHAT THIS SAYS, IT SHOWS THESE PEOPLE AS BEING RIF'D. JANET DAVIS IS SHOWING AS A RIF?

A. CORRECT.

Q. CARL ATWELL IS SHOWN AS A RIF?

A. CORRECT.

Q. NOW CARL ATWELL, HE'S A MAN WHO'S BIRTH DATE WAS 1969, SO AT THE TIME THAT THIS HAPPENED, HE WAS 69, 23 OR 4?

A. NO, NO, 69, 79, 89, 99, 30.

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Q. OKAY. THIRTY. AM I BAD ON MATH. IS IT CORRECT THAT JANET DAVIS, WHO'S SHOWN ON HERE, WASN'T ACTUALLY SOMEBODY WHO -- YOU HAD THE INVOLUNTARILY RIF, THIS IS DESIGNATED AS A VOLUNTARY RIF BECAUSE SHE WAS MOVING OUT OF TOWN?

A. SHE -- WELL, I DON'T KNOW IF IT WOULD HAVE BEEN INVOLUNTARY OR VOLUNTARY, BUT SHE SPOKE UP IN THE MIDDLE OF OUR RESEARCH OF RESTRUCTURING THIS TO SAY THAT SHE WAS MOVING, SO THEREFORE, YOU KNOW, SHE WOULD HAVE BEEN LEAVING, SO WE INCLUDED HER IN THE HEAD COUNT.

Q. AND THIS KIND OF INFORMATION, IS THIS THE INFORMATION THAT WOULD GO TO THE LEGAL DEPARTMENT AS FAR AS YOU KNEW TO DETERMINE, YOU KNOW, WHATEVER THAT ADVERSE IMPACT IS?

A. PIECE -- YES. I DON'T KNOW THAT THIS EXACT SPREADSHEET WENT, BUT, YES, SOMETHING LIKE THIS.

* * *

Q. AND STEVE CARRITHERS, THERE'S ACTIVE PLACEMENT OPTIONS FOR HIM?

A. WITHIN THE BDS ORGANIZATION.

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Q. YES, MA'AM. CONNIE KENNEDY -- SO THIS DOES SHOW THAT -- WHAT'S GOING ON AS OF NOVEMBER 2ND IS THESE FOLKS -- IS THAT, WITHOUT THEM EVEN KNOWING THAT IT'S GOING ON, THAT THEY'RE BEING ACTIVELY PROMOTED FOR JOBS?

A. YES.

Q. OKAY. THEN YOU'VE GOT DEB LAW, VICKIE WALTON, SHE'S GOING TO BE KEPT AND THAT'S WHAT EVENTUALLY HAPPENED?

A. YES.

Q. AND THEN, OFFICERS ELIMINATED - NO KNOWN PLACEMENT OPTIONS, THAT WOULD BE MARC ELSTER, 11-22, AND DOUG REINHARDT, 11-22. THIS INDICATES THEY WOULD BE INFORMED ON THAT DATE?

A. NO, THAT WAS THEIR EFFECTIVE DATE. THEY WERE INFORMED, I THINK, THE 14TH AS WELL.

Q. SO IT'S ALREADY PLANNED AS OF THIS DATE, CONSISTENT WITH WHAT WE SAW IN THE EXCEL SPREADSHEET, THAT HE WOULD REMAIN RIF'D TO THE STREET?

A. CORRECT. ON THIS DATE, YES.

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Q. STAFF ELIMINATED - NO KNOWN PLACEMENT OPTIONS, WE'VE NOTED JANET DAVIS, HER HUSBAND WAS MOVING. WAS HE ASSIGNED TO HOMELAND SECURITY?

A. THAT'S WHAT I THINK IT WAS.

Q. FRANCIS DEBLAUWE. FRANCIS IS BEING RIF'D TO THE STREET 11-22, ELLEN MENDELSOHN, RIF'D TO THE STREET, NATALIE O'BANNON, RIF'D TO THE STREET, SANJAY VERMA, RIF'D TO THE STREET?

A. CORRECT.

Q. AND THEY'RE GOING TO COUNT AS PART OF THE RIF NOT FILLING SIX OPEN POSITIONS?

A. CORRECT.

Q. SO AS WE'RE SEEING HERE, THERE ARE WAYS THAT YOU CAN ACHIEVE YOUR NUMBERS, NOT BY NECESSARILY REDUCING FORCE, BUT AS WE SEE HERE, YOU DON'T FILL AN OPEN POSITION, THAT'S AN OPTION THAT WAS USED?

A. THAT'S ABSOLUTELY THE FIRST THING YOU DO.

CAN I SAY THE PURPOSE OF THIS DOCUMENT?

Q. YES, YOU CAN.

A. THE PURPOSE OF THIS DOCUMENT WAS BILL BLESSING WAS TRYING TO REDUCE HIS -- I'LL CALL IT BOGEY, HIS NUMBER OF WHAT HE WAS HAVING TO REDUCE. SO HE WENT BACK ACTIVELY TO -- HE WAS PUTTING THIS TOGETHER TO GO BACK ACTIVELY IN FRONT OF HIS BOSS TO TRY TO REDUCE THE NUMBER THAT HE HAD TO ELIMINATE. SO THAT WAS PART OF THAT, ALONG WITH THE FINANCIAL DOCUMENT.

Q. NOW, IF YOU'LL TAKE A LOOK AT 463 IN YOUR BOOK. THIS WILL SIMPLY ILLUSTRATE WHAT I TOLD THE JURY A FEW MOMENTS AGO, THAT WE WOULD FIND ORGANIZATIONAL CHARTS WITH YOUR HANDWRITING RELATING TO CERTAIN ACTIONS THAT WERE TAKING PLACE.

A. OKAY.

Q. AND THIS IS BLESSING DIRECT REPORTS. AND I'M GOING TO LOOK DOWN ON THE LEFT-HAND SIDE, WE'VE GOT THE NAME JANET DAVIS AND IN YOUR HANDWRITING VOL RIF, VOLUNTARY RIF?

A. THAT WOULD BE MY HANDWRITING, YES.

Q. SO A FEW MOMENTS AGO YOU WEREN'T SURE IT WAS VOLUNTARY OR INVOLUNTARY?

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A. I MEAN, THAT'S MY PHRASING. I DON'T KNOW THAT WE CALL IT VOLUNTARY OR INVOLUNTARY. IT WAS A RIF. WE GAVE HER A SEPARATION PACKAGE. BUT IT WAS BECAUSE WE KNEW SHE WAS LEAVING THE COMPANY ANYWAY AND WE NEEDED TO GO DOWN IN HEAD COUNT SO WE INCLUDED HER IN OUR REDUCTION.

Q. MARC ELSTER, THAT'S ONE WHERE AS OF THE DATE YOU KNEW -- ALREADY KNEW THAT BILL BLESSING HAD MADE THE DECISION TO RIF MR. ELSTER?

A. YES.

Q. AND YOU SO DESIGNATE. OVER ON THE RIGHT-HAND SIDE, DOUG REINHARDT. AND THAT'S YOUR HANDWRITING WHERE IT SAYS FUNCTIONAL RIF?

A. YES, THAT'S ACCURATE.

Q. BY THE WAY, THE PEOPLE UNDER HIM -- AND I DON'T KNOW THE NAME DENISE OLIVER. DO YOU KNOW IF DENISE OLIVER -- EVEN THOUGH THIS FUNCTION IS ELIMINATED, DID DENISE OLIVER REMAIN WITH SPRINT?

A. DENISE OLIVER SUPPORTED BOTH DOUG AND STEVE FALK. YOU SEE STEVE FALK IN THE MIDDLE?

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Q. YES.

A. AND SO DENISE STAYED AND CONTINUED SUPPORTING STEVE FALK.

Q. WITH RESPECT TO MR. ELSTER, DO YOU KNOW -- AND IT'S IN THE DOCUMENTS THEMSELVES, DO YOU KNOW IF HE HAD APPROXIMATELY 10 AND A HALF, 18 YEARS EXPERIENCE?

A. SERVICE?

Q. SERVICE.

A. HE HAD SERVICE -- HOLD ON.

Q. THAT PAGE 459 MAY TELL YOU.

A. LET ME FIND HIM. YES. 3-12 OF '84 IS HIS HIRE DATE.

Q. AND HIS BIRTH DATE, WHAT WAS HIS BIRTH DATE?

A. IT'S NOT ON THIS DOCUMENT.

Q. OKAY.

A. BUT I THINK YOU'VE ALREADY SAID HE WAS 51.

* * *

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Q. THE REDUCTION WAS SUPPOSED TO TAKE PLACE -- LET ME JUST ASK IT THIS WAY. DID A REDUCTION IN THE NUMBER OF EMPLOYEES TAKE PLACE IN THE NOVEMBER TIME FRAME, NOVEMBER 2002, IN THE BDS BUSINESS UNIT --

A. YES.

Q. -- DIVISIONS OF PCS?

A. YES, THEY WENT FROM APPROXIMATELY WHAT, 75 -- I THINK WE SAW AN ARTICLE EARLIER, 75 POSITIONS DOWN TO 56 OR 60.

Q. AND PLAINTIFF WAS ONE OF THE EMPLOYEES WHO LOST THEIR JOB AS PART OF THAT REDUCTION IN FORCE, IS THAT CORRECT?

A. YES.

Q. ALL RIGHT. LET'S GO THROUGH EXACTLY HOW THIS OCCURRED. WHAT WERE THE FIRST DECISIONS THAT WERE MADE AS PART OF THE REDUCTION IN FORCE?

A. WELL, WE STARTED AT THE TOP. SO BILL BLESSING LOOKED ACROSS HIS ORGANIZATION TO DETERMINE WHAT FUNCTIONS HE COULD DO WITHOUT OR FELT LIKE THE COMPANY CAN DO WITHOUT, SO -- AND ALSO SO WE STARTED WITH THE VP LAYER AND DETERMINED THAT -- OR HE DETERMINED THAT WE COULD REDUCE SOME OF

THE VPS. FLATTEN OUT THE ORGANIZATION A LITTLE BIT.

Q. AND ALTHOUGH YOU MAY NOT BE ABLE TO SEE EVERYTHING THAT'S IN THE BOX, THE VP, THAT'S THE TOP LINE OF BOXES, IS THAT RIGHT?

A. YES. SORRY, YES. LAYER 2.

Q. AND THERE WERE FIVE VPS, IS THAT CORRECT?

A. CORRECT.

Q. AND IT IS YOUR UNDERSTANDING HE MADE A DECISION TO REDUCE IT DOWN TO THREE?

A. YES, HE DID,

Q. AND THE TWO INDIVIDUALS WHO WERE LAID OFF AS A RESULT OF THAT DECISION BY MR. BLESSING -- AND BY THE WAY, DID PAUL REDDICK HAVE ANYTHING -- ANY INPUT IN THAT DECISION?

A. NO, HE DID NOT.

Q. IN FACT, HE WAS ONE OF THE CANDIDATES FOR THE REDUCTION, RIGHT?

A. YES, HE WAS.

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Q. SO OUT OF THE FIVE INDIVIDUALS, TWO WERE LET GO AND DO YOU RECALL WHO IT WAS?

A. MARC ELSTER AND DOUG REINHARDT.

Q. LET'S TALK ABOUT DOUG REINHARDT FIRST. WHAT WAS THE -- TELL US ABOUT THE DECISION TO --

A. THE AREA THAT DOUG REINHARDT HAS OVER, STRATEGIC ALLIANCES, WAS BASICALLY A DUPLICATION OF A FUNCTION THAT WAS ALSO DONE IN THE GMG ORGANIZATION, SO MR. BLESSING DECIDED THAT THEY COULD CONSOLIDATE THOSE AND HAVE THEM PERFORMED IN GMG AND IT WOULDN'T BE A DUPLICATIVE FUNCTION GOING FORWARD.

Q. LET ME JUST STOP YOU THERE AND GO BACK TO OUR DIVISION CHART. SO WHAT YOU'RE SAYING IS THAT INSIDE OF BDS, MR. REINHARDT WAS IN CHARGE OF WHAT THEY CALL STRATEGIC ALLIANCES, CORRECT?

A. CORRECT.

Q. AND MR. BLESSING IN DOING HIS WORKFORCE ANALYSIS, HE DETERMINED THAT INSIDE OF GMG, THIS OTHER DIVISION OF SPRINT, THERE WAS -- THERE WERE OTHER EMPLOYEES DOING SIMILAR TYPE WORK?

A. CORRECT.

Q. AND SO HE DECIDES, WE CAN'T AFFORD TO DO THIS WORK ANYMORE IN OUR DEPARTMENT, IS THAT RIGHT?

A. CORRECT

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Q. (BY MR. MONAFO) I'VE PLACED AN X, MISS RENDA, IN THE LINE LEADING DOWN TO DOUG REINHARDT'S NAME. AGAIN, JUST TO CLARIFY WHAT WE WROTE, THAT WAS STRATEGIC ALLIANCES AND THAT FUNCTION OF WORK WAS NO LONGER GOING TO BE PERFORMED WITHIN MR. BLESSING'S ORGANIZATION?

A. THAT'S CORRECT.

Q. NOW, WERE MR. CARRITHERS, CONNIE KENNEDY AND VICKIE WALTON LAID OFF AS WELL?

A. THEY WERE SUBJECT TO LAYOFF, YES.

Q. WHAT DID -- WHAT HAPPENED WITH RESPECT TO THEM?

A. STEVE CARRITHERS AND VICKIE WALTON WERE ABSORBED INTO THE BUSINESS DEVELOPMENT ORGANIZATION. CONNIE KENNEDY FOUND ANOTHER POSITION WITHIN SPRINT.

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Q. WE'LL COME BACK TO THAT AND THEN WITH MR. ELSTER'S GROUP, WERE HIS MANAGERS ALSO CONSIDERED FOR OTHER POSITIONS?

A. NO, MR. ELSTER WAS THE ONE THAT WAS LET GO AND THE OTHER --

Q. AND HIS MANAGERS UNDERNEATH?

A. THE MANAGERS ARE THE ORGANIZATION UNDERNEATH HIM, THERE WAS SOME CONSOLIDATION. WE -- THEY COMBINED THERESA DODSON AND NATALIE O'BANNON'S POSITION TOGETHER INTO ONE.

Q. AFTER MR. ELSTER WAS LAID OFF, DIDN'T THESE MANAGERS MOVE INTO PAUL REDDICK'S --

A. YES.

Q. -- SPOT?

A. YES.

* * *

Q. (BY MR. MONAFO) AFTER THE VICE-PRESIDENTS -- DECISIONS WERE MADE BY MR. BLESSING ON THE VICE-PRESIDENTS, WERE THERE SUBSEQUENT MEETINGS AT THAT POINT?

A. YES.

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Q. AND WHO WERE THOSE --

A. SEVERAL.

Q. WHO WERE THOSE MEETINGS BETWEEN?

A. THERE WERE MEETINGS WITH BILL BLESSING AND PAUL REDDICK. THERE WERE MEETINGS WITH BILL BLESSING AND STEVE FALK, MEETINGS WITH BILL BLESSING AND BENNETT GAMEL AND MYSELF.

Q. THIS IS GAMEL OVER HERE?

A. RIGHT.

Q. AND HE'S MAKING DECISIONS, ALONG WITH MR. BLESSING, THE TOP OF THE ORGANIZATION, ABOUT THE FOLKS OVER IN HIS ORGANIZATION, IS THAT CORRECT?

A. CORRECT.

Q. AND THEN MR. FALK IS DOING THE SAME THING --

A. CORRECT.

Q. ABOUT HIS ORGANIZATION? AND NOW THAT MR. ELSTER AND MR. REINHARDT AND MR. BLESSING HAVE MADE THE DECISION THEY ARE NOT GOING TO BE PART OF THE ORGANIZATION

GOING FORWARD, WHO IS MEETING WITH MR. BLESSING ON ALL THESE PEOPLE?

A. PAUL REDDICK.

* * *

Q. AND WE TALKED A LITTLE BIT ABOUT THE FORMER MANAGERS UNDER MR. REINHARDT'S GROUP, CARRITHERS, KENNEDY AND WALTON. AND WERE THEY ALL CONSIDERED INCUMBENTS IN THE -- IN THIS NEW REDDICK ORGANIZATION?

A. YES.

Q. AND LET'S TALK ABOUT MR. CARRITHERS FOR A MOMENT, DO YOU RECALL HOW OLD MR. CARRITHERS WAS?

A. UH, 55 OR SO.

* * *

Q. AND WHERE DID -- DO YOU RECALL WHERE MR. CARRITHERS WENT?

A. HE ENDED UP IN A SPOT WITHIN THE REDDICK ORGANIZATION. LET ME GET TO THE --

Q. DO YOU KNOW IF HE MOVED INTO JOHN OVARY'S GROUP?

A. YES, HE DID.

* * *

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Q. NOW BACK TO MR. CARRITHERS. DO YOU RECALL HE MOVED INTO JOHN OVARY'S NEW ORGANIZATION?

A. YES.

Q. HOW ABOUT VICKIE WALTON? DO YOU REMEMBER WHAT HAPPENED TO VICKIE WALTON?

A. VICKIE WALTON MOVED INTO WES DITTMER'S AREA, THE N BUILDING INCUBATOR GROUP AND THEN --

Q. AND THEN CONNIE KENNEDY, WHAT HAPPENED TO CONNIE KENNEDY?

A. CONNIE KENNEDY FOUND A POSITION IN GMG.

Q. SO THAT WOULD HAVE BEEN ONE OF THE DIVISIONS OUTSIDE OF PCS ONCE AGAIN?

A. CORRECT.

Q. AND YOU TOLD US STEVE CARRITHERS WAS 55. DO YOU REMEMBER HOW OLD CONNIE KENNEDY WAS?

A. UH, I THINK SHE'S 51, ISN'T SHE?

Q. AND I THINK 51 AND VERY CLOSE TO THE PLAINTIFF'S AGE. ACTUALLY, THESE WERE AGES AT THE TIME OF --

A. AT THE TIME IN 2002, YES.

Q. AND HOW ABOUT VICKIE WALTON?

A. UH, DO YOU HAVE THAT?

Q. ABOUT THE SAME. WE DO, WE'LL PUT IT UP.

A. VICKIE WALTON WAS 51 AS WELL.

Q. AND THESE WERE DECISIONS MADE BY PAUL REDDICK?

A. CORRECT.

Q. ON MR. REINHARDT'S OLD MANAGERS, THEY WERE WORKING ON STRATEGIC ALLIANCE PROJECTS?

A. BY HIS FORMER MANAGER, YES.

Q. AND HE TOOK THEM ALL INTO HIS NEW ORGANIZATION.

A. YES, THAT THEIR SKILL SETS FIT NICELY.

* * *

Q. WAS THERE EVER ANY CONVERSATION BY MR. REDDICK TO PUT VICKIE WALTON INTO MFS?

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MR. MONAFO: PUTTING THAT ACTUAL SPREADSHEET INTO EVIDENCE WITH THE AGES ON THERE OF PEOPLE WHO ARE NOT SIMILARLY SITUATED, THAT'S MY --

MR. EGAN: SPRINT HAS DOCUMENTS THAT SHOW AGES IN AN AGE CASE. THE FACT THAT SPRINT SHOWS AGES IN AN AGE CASE IS RELEVANT IN ITSELF. WE CAN TALK TO THE WITNESS AND I'LL DRAW OUT FROM HER HOW IT WAS USED, BUT DOCUMENTS SHOWING INDIVIDUALS AND DEMOGRAPHIC INFORMATION IS ABSOLUTELY RELEVANT.

MR. MONAFO: AND JUST TO UNDERSTAND, I DON'T OBJECT, I KNOW I INTEND TO BRING IT OUT MYSELF, BUT SHE HAD SPREADSHEETS WITH THE PEOPLE'S AGES ON IT, HOW ELSE COULD SHE DO HER JOB? BUT MY OBJECTION IS THE PEOPLE SHOULD NOT LEARN THE ACTUAL AGES OF A BUNCH OF PEOPLE WHO ARE NOT SIMILARLY SITUATED TO THE PLAINTIFF. I THINK ONLY THE PEOPLE WHO WERE SIMILARLY SITUATED, THOSE ARE THE AGES OF THE RELEVANCE.

THE COURT: I THINK WE'RE GOING TO NEED TO DEAL WITH THIS ON AN EXHIBIT-BY-EXHIBIT BASIS, BUT I THINK YOU MAY BE OVEROPTIMISTIC IN SAYING YOU'RE GOING TO ELICIT TESTIMONY THAT AGE WAS PART OF WHAT THEY COULD CONSIDER, BUT NOT LET THE JURY SEE THE DOCUMENTS THAT OUTLINE WHAT THE AGES ARE.

IN LIMINE ORDER. THE ONLY PEOPLE THAT PLAINTIFF CAN COMPARE HERSELF TO ARE THE PEOPLE WHO SHE WAS SIMILARLY SITUATED TO.

MR. EGAN: YOUR HONOR, I DO NOT UNDERSTAND THAT TO BE THE COURT'S RULING. WHAT THE DEFENDANT WANTED US TO DO WAS KEEP OTHER EMPLOYEES FROM OTHER AREAS, NOT THE BDS GROUP. FOR INSTANCE, THERE'S A GENTLEMAN NAMED MARC ELSTER AND WE COVERED ALL THIS IN THE SUMMARY JUDGMENT ORDER. HE WAS 51, HE WAS TERMINATED BY BLESSING AS PART OF THIS. THERE'S REINHARDT, THERE'S VARIOUS PEOPLE. OF COURSE, THEY USE IT AS TOOLS, THAT'S THE WAY THEY GOT DOWN TO THE CUTS. THAT'S SOMETHING THAT THE JURY HAS A RIGHT TO KNOW AND PIECE TOGETHER.

AND I'M SURE THEY WILL ATTACK ELLEN MENDELSOHN, SHE'S A BAD PERFORMER, WE THINK IT'S AGE, WE HAVE TO BE ABLE TO SHOW WHAT THE COMPARATIVE AGES ARE. I CAN TRY AND PIECE IT TOGETHER, BUT HONESTLY IT IS TOUGHER TO DO. I WILL DO MY BEST TO DO IT AS I GO THROUGH WITH THIS WITNESS.

MR. MONAFO: WELL, IF -- LIKE I SAID, MY MAJOR CONCERN -- REALLY MY OBJECTION IS TO THE SPREADSHEET.

MR. EGAN: I AM GOING TO ASK HER ABOUT THE SPREADSHEETS. THEY ARE SPECIFIC ABSOLUTE TOOLS THAT SHE USED.

THERE ARE A BUNCH OF PEOPLE ON THESE LISTS THAT REDDICK HAD NOTHING TO DO WITH. THEY WERE PART OF THE RIF. AND IF THEY HAD ALL THIS INFORMATION, MY CONCERN IS IT WOULD BE BACK THERE, THEY'LL GO GET ALL THE INFORMATION THAT THE ORDER DID EXCLUDE.

MR. EGAN: I FULLY AGREE IF WE LET THIS COME IN THEY'RE GOING TO GET A BUNCH OF NAMES OR A BUNCH OF DIFFERENT PEOPLE, BUT NOT PEOPLE WHO ARE NOT SIMILARLY SITUATED. THEY ARE NOT GOING TO BE THE DISCRIMINATED. YOU'RE THE ONE THAT'S SAYING IT'S A RIF AND YOU'RE SAYING IT'S A LEGITIMATE, NONDISCRIMINATORY RIF. SO I DON'T SEE HOW YOU CAN POSSIBLY PROVE THAT IF YOU ONLY LET IN EVIDENCE -- THE RIF AFFECTED MORE THAN THE PEOPLE IN PLAINTIFF'S GROUP.

MR. MONAFO: ABSOLUTELY.

THE COURT: SO YOU CAN'T HAVE IT BOTH WAYS.

MR. MONAFO: I WAS TRYING TO DRAW THE LINE IS JUST THAT, YES, THERE WAS A RIF. YES, IT WAS BIGGER THAN HER GROUP, IT WAS THE WHOLE PCS BUSINESS UNIT. BUT WE'RE NOT GOING TO GO THROUGH THE DEMOGRAPHICS OF EVERYBODY IN THE PCS BUSINESS UNIT. WE'RE GOING -- ONLY GOING TO FOCUS -- HONE IN ON PAUL REDDICK, THAT WAS MY UNDERSTANDING OF THE MOTION

WANTED TO AVOID PUTTING IT IN OUT OF ORDER SO WE MARKED THEM THAT WAY AND WILL ASK WITNESSES ABOUT THEM, EVERY ONE OF THEM HAS BEEN -- YEAH.

MR. MONAFO: THERE'S NO DISPUTE ABOUT THAT.

MR. EGAN: WELL, I MEAN THE POINT IS THEY'RE PRODUCED AS SPRINT 435 THROUGH 467, ET CETERA, THERE'S ORGANIZATIONAL CHARTS THAT WILL BE RELEVANT FOR VARIOUS WITNESSES. THEY'RE ALL GOING TO COME IN AS UNCONDITIONALLY RELEVANT BECAUSE MOST OF THESE HAVE HANDWRITING BY BILL BLESSING THAT JO RENDA WORKED WITH HIM ON THE CUTS THAT ARE MADE. SO, YES, I APOLOGIZE THAT THEY ARE, UNFORTUNATELY, A GROUP OF DOCUMENTS.

THE COURT: WHY DON'T YOU OFFER THEM LIKE BREAK IT DOWN TO DISCRETE DOCUMENTS, HAVE IT MARKED DOWN TO 4A, 4B, 4C AND DEAL WITH THEM ONE BY ONE.

MR. EGAN: I CAN TRY. IT JUST TAKES LONGER TO DO. I'M TRYING TO BE -- I WANT TO USE THE WORD EFFICIENT.

THE COURT: IF THESE ARE ALL COMING IN --

MS. MILLER: I DON'T HAVE ANY INTENTION TO FORCE HIM TO DO SOMETHING THAT'S GOING TO MAKE IT INEFFICIENT. IF THIS ALL JUST CAME IN,

WOULD HAVE TO HAVE BEEN SUPERVISED BY PAUL REDDICK, SO I UNDERSTAND THAT ASPECT OF IT. JUST SO THE COURT'S AWARE, THESE DOCUMENTS ARE ALL WERE USED BY HR, THEY WERE DOCUMENTS, AS SHE'S TESTIFIED, THAT WERE USED AS TOOLS TO DECIDE HOW THEY MAKE THE CUTS.

WE'VE ALREADY HEARD FROM MS. MILLER IN OPENING STATEMENT THAT OTHER PEOPLE LOST THEIR JOBS FROM BDS, SO IT'S CERTAINLY, YOU KNOW, PART OF THE EVIDENCE IN THIS CASE THAT I EXPECT THE DEFENDANT WOULD WANT TO USE THAT OTHER PEOPLE RECEIVED RIFS AND SO THEY JUST -- YOU KNOW, THEY DON'T GET TO AVOID THE FACT THAT THIS IS AN AGE CASE, THIS IS ALL THEIR DOCUMENTS THAT WERE USED DURING THE RIFS AS THE TOOLS TO GET DOWN TO THE CUTS THAT WERE MADE. IT'S ALL RELEVANT TO THIS CASE.

THE COURT: IS IT ONE, A SINGLE DOCUMENT, OR HAVE YOU PUT TOGETHER A GROUP OF DOCUMENTS?

MR. EGAN: WE MARKED THEM AS THEY WERE PRODUCED TO US. IT'S A SERIES OF DOCUMENTS THAT ALL OF THEM RELATE TO THIS BDS GROUP. MANY OF THEM RELATE TO SUCH THINGS AS -- AND THEY'VE BEEN MIXED TOGETHER. YOU KNOW HOW IT IS SOMETIMES IN THESE CASES, THEY'RE -- YOU KNOW, THE DEFENDANT -- I'M NOT CRITICAL, BUT IT'S JUST THE WAY IT'S PRODUCED TO US. SO WE

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NUMBER TWO, I THINK YOU ALL STIPULATED THEY'RE BUSINESS RECORDS AND THEY'RE ADMISSIBLE SUBJECT TO -- ONLY TO OBJECTIONS AS TO RELEVANCE

MR. EGAN: YES, YOUR HONOR.

THE COURT: I BELIEVE THAT'S IN THE PRETRIAL ORDER. SO IF YOUR OBJECTION JUST GOES TO FOUNDATION --

MR. MONAFO: WELL, YOUR HONOR, I THINK THE MAIN THING THAT CAUGHT MY EYE IN THE SPREADSHEETS IS THAT THEY'VE GOT -- THERE IS VARIOUS ORGANIZATIONAL CHARTS THAT IF THE JURY LOOKED AT -- THEY HAD ALL THIS BACK IN THE ROOM, THEY WOULD BE ABLE TO PIECE TOGETHER THAT SOMEBODY WAS PART OF THE RIF AND GET THEIR AGES AND SOMEBODY WHO PAUL REDDICK HAD NO DECISION-MAKING AUTHORITY OVER. THAT'S MY CONCERN.

MR. EGAN: YOUR HONOR, MAYBE WE BETTER VISIT ABOUT THAT. YOU KNOW, AS YOU RECOGNIZED IN YOUR ORDER, THE DECISIONS TO MAKE THE RIFS IN THE BDS ORGANIZATION WERE MADE BY BLESSING AND REDDICK AND THAT IS THE FACT.

AS FAR AS MY BEING ABLE TO BRING IN OTHER EMPLOYEES TO TESTIFY AS TO HOW THEY WERE TREATED, YOUR RULING CLEARLY SAYS THEY

EXCUSE ME, THE MOTION IN LIMINE ORDER, THEY'RE NOT SIMILARLY SITUATED.

IF THEY COME INTO EVIDENCE THE JURY COULD HAVE THEM BACK IN DELIBERATIONS AND THEY WOULD BE CONSIDERING AGES AND THINGS OF THAT NATURE THAT THEY SHOULDN'T EVEN CONSIDER. SO THAT'S ONE OF THE MY CONCERNS, CERTAINLY ON THE SPREADSHEET.

BUT THEY SAID THERE'S A GROUP -- THIS IS A GROUP OF DOCUMENTS THAT DIFFERENT PEOPLE CREATED SO I THINK THE FOUNDATION NEEDS TO BE LAID THROUGH DIFFERENT WITNESSES.

MR. EGAN: YOUR HONOR, MY --

THE COURT: FIRST OF ALL, I DON'T THINK THAT I EVER RULED THAT THE JURY CAN'T KNOW ANY AGES OR RACES OR NAMES OF OTHER PEOPLE.

MR. MONAFO: CORRECT.

THE COURT: SO WHAT THE MOTION IN LIMINE GOES TO IS THE ARGUMENT THAT THE PLAINTIFF MAY ARGUE AS TO ADVERSE TREATMENT OF THESE OTHER PEOPLE BECAUSE OF THEIR AGE. SO AS LONG AS THIS IS JUST GOING IN AS BACKGROUND INFORMATION, I DON'T SEE WHAT CONCEIVABLE INFERENCE THE JURY CAN DRAW FROM IT. THAT'S NUMBER ONE.

APPENDIX S — EXCERPTS FROM TRIAL TRANSCRIPT DATED JANUARY 4, 2005

* * *

MR. MONAFO: YOUR HONOR, EXHIBIT 4 IS A COMPILATION OF VARIOUS DIFFERENT DOCUMENTS. I THINK WE -- I DON'T THINK IT CAN BE TAKEN AS A BIG GROUP OF EXHIBITS LIKE THIS. SO I WOULD HAVE AN OBJECTION TO -- THERE'S SOME SPREADSHEETS IN HERE THAT HAVE INFORMATION, FOR EXAMPLE, THAT WOULD BE BARRED UNDER SOME OF THE PRETRIAL ORDERS. IF HE'S GOT A PARTICULAR DOCUMENT --

MR. EGAN: I DON'T KNOW WHAT HE'S TALKING ABOUT ITS BARRED BY THE PRETRIAL ORDER.

MR. MONAFO: IT APPEARS TO BE.

ME. EGAN: MAY WE APPROACH?

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD BETWEEN COURT AND COUNSEL AT THE BENCH OUTSIDE THE HEARING OF THE JURY:)

MR. MONAFO: YOUR HONOR, THE OBJECTION IS EXHIBIT 4 IS A GROUP OF DOCUMENTS THAT SOME OF THEM ARE SUCCESSION PLANNING, SOME OF THEM ARE ACTUALLY FROM THE RIF. IT'S A COMPILATION OF VARIOUS THINGS. THERE'S SOME SPREADSHEETS IN HERE THAT CONTAIN DATES OF BIRTH, FOR EXAMPLE, RACE, AGE OF PEOPLE WHO I THINK, BY VIRTUE OF THE PRETRIAL ORDER -- OR

945 F.2d 1054, 1056-57 (8th Cir. 1991) (Other complaints of age discrimination should have been "freely admitted at trial.")

V. Defendant objects by stating plaintiff's disclosures fail to adequately identify witnesses and their expected testimony. Defendant points out that plaintiff listed as a potential witness: "records custodians, should certain records other than defendant become relevant and necessary." This listing is for rebuttal and/or impeachment purposes only. Therefore, plaintiff cannot contemplate the subject matter of the expected testimony or provide a brief synopsis of the substance of the facts to which the witness is expected to testify, until such time rebuttal and/or impeachment of defendant's witnesses would be necessary.

WHEREFORE, for the foregoing reasons, defendant's objections to Plaintiff's Final List of Potential Witnesses should be denied.

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view such pieces of evidence in the context of *all* evidence and inferences derived therefrom. Rule 401 defines "relevant evidence" as meaning: "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Plaintiff's evidence on these subjects meets the test of Rule 401, and must be considered and weighed by the Court in the context of trial.

IV. Defendant objects to plaintiff listing individuals whom defendant claims are not similarly situated and know nothing about plaintiff and/or her separation of employment from Sprint. As plaintiff set forth in her Opposition to Defendant's Motion in Limine, Tenth Circuit law is solidly *against* defendant. *Minshall v. McGraw Mill Broadcasting Company, Inc.*, 323 F.3d 1273 (10th Cir. 2003) at 1285; *Spulak v. K-Mart Corporation*, 894 F.2d 1150 (10th Cir. 1990); *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991); *Greene v. Safeway Stores, Inc.*, *supra*, 98 F.3d 554, at 561. Plaintiff worked in Business Development, which is a department within the Sprint PCS division. Exhibits 3 and 4 which are Succession Planning documents are entitled "PCS Succession Planning." Plaintiff listed witnesses who also worked in Sprint PCS and were terminated in the same time-frame as she was, also as part of a RIF. For the reasons stated in plaintiff's Opposition to Defendant's Motion In Limine, defendant's objections to prohibiting evidence from other employees terminated in Sprint's PCS reduction-in-force under similar circumstances as plaintiff must be denied. See also *Estes*, supra, (evidence showing "history and work practices" probative of a climate of age and race discrimination must be admitted); *Phillips v. ANR Freight*,

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Defendant states that plaintiff asserts Jim Fee, Paul Reddick, and Bill Blessing "will have knowledge" of "age bias comments by defendant's management toward older employees." Defendant objects to this assertion by stating plaintiff has testified she is unaware of any such alleged comments attributable to Sprint's management. Defendant is correct that this is plaintiff's testimony, but plaintiff does not know how Jim Fee, Paul Reddick and Bill Blessing will testify until they are asked at trial.

Defendant next objects to plaintiff eliciting testimony regarding Sprint's Staff Associate Program and Alpha Rating System. As plaintiff stated in her Memorandum in Opposition to Sprint's Motion in Limine, Sprint's Alpha Rating System and Staff Associate Program most certainly may be relevant and admissible.

Sprint's Alpha Rating System most certainly will be relevant — as this Court recognized in the Summary Judgment Order. Improper use of the "new" Alpha Rating System, contrary to Sprint's policies and procedures on same, is one piece of evidence on the overall issue of pretext.[1] Plaintiff does not intend herself to offer "opinions" as to whether the Alpha Rating System or Staff Associate Program have "a discriminatory purpose or effect." (*See* Defendant's Motion In Limine, at 5). To the extent facts on those subjects properly come into play in the evidence, it will be fact-based only. The jury must make its own conclusions as to how they

1. *See* Order Denying Summary Judgment, at page 3 (dealing with the Alpha Rating System, among other subjects); and pages 5-6 (dealing with how the manipulations of the evaluation system constitutes one prong of the evidence going to pretext).

Appendix R

II. Defendant objects to plaintiff's disclosures which it labels as conclusory allegations and unfounded opinions. As plaintiff stated in her Memorandum In Opposition to Defendant's Motion In Limine, Court Doc. #87, plaintiff intends to testify concerning her **personal observations** regarding Paul Reddick, rather than offer improper opinion testimony and conclusory allegations. She must be permitted to present evidence describing what she saw and observed firsthand, regarding selections made by the defendant (particularly Reddick) in promotions, demotions, and reductions-in-force. The Court must assess this subject in the full context of the trial evidence, including how and in what context it is offered.

This is an age discrimination case. Plaintiff must be allowed proper latitude to try to prove her case, by showing how she was treated compared to other younger employees; she must be allowed to testify regarding her observations of her own workload and her personal hands-on knowledge and experience in working with certain employees. Blanket pretrial prohibitions of evidence are extremely dangerous and damaging in discrimination cases, where "plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Estes v. Dick Smith Ford*, 856 F.2d 1097, 1103 (8th Cir. 1988). From all the circumstances, the jury must decide whether defendant's proffered reasons for choosing plaintiff for RIF are pretextual. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159 (10th Cir. 1998).

III. Defendant objects to plaintiff's disclosures that defendant claims were not previously raised by plaintiff.

policies and procedures on same, is one piece of evidence on the overall issue of pretext.

Defendant has known all along that Kissinger played a large part in the Reduction-In-Force procedure that involved plaintiff, and others, even though his name was not individually listed on plaintiff's Voluntary Rule 26 Disclosures. If the court should rule that Mr. Kissinger cannot testify live at trial, then plaintiff should be allowed to read as an Admission Mr. Kissinger's testimony — given as Sprint's Rule 30(b)(6) designee — in another age case involving the RIF waves at issue here: *Williams v. Sprint*, Case No. 03-2200-JWL. Such use is expressly authorized under Rule 32 (a)(2) "for any purpose." (Fed.R.Civ.P.) Such deposition admissions also are expressly authorized under Rule 801(d)(2) to be offered as Sprint's statement of fact by Rule 30(b)(6) witness Kissinger. Finally, utter absence of any surprise or prejudice is shown by the fact plaintiff explicitly signaled the intended possible use of this deposition Admission at p. 72, fn 7 of Plaintiff's Summary Judgment Response:

> Jim Kissinger, Sprint's top HR officer, gave a Rule 30(b)(6) deposition in the *Williams* class action. There, Kissinger testified for Sprint that the RIF Displacement Guidelines are "mandatory." (Kissinger depo., 12/17/03, p. 35). Kissinger's depo. is *not* attached, since he can be called as a witness at trial in *Mendelsohn*, or his testimony can be read.

her Witness List — on December 16, 2004. Defendant filed its Witness List long after business hours the night before. Plaintiff had calculated the deadlines for filings in this case the same way these same parties calculated deadlines for similar filings in a case recently tried against Sprint, *Cami Owens v. Sprint United Management*, Case No. 03-2371-JWL. This time, however, Sprint counted differently. Sprint has *not* been prejudiced in *any* way, and had time to object to Plaintiff's Witness List.

Defendant's Specific Objections

I. Defendant's objection that plaintiff has improperly listed a previously undisclosed witness is unfounded. James Kissinger, Sprint's Senior Vice President of Human Resources, was discussed throughout Jo Ella Renda's deposition that was taken in this case on February 23, 2004. Ms. Renda testified that James Kissinger was her supervisor until 2003. (Renda p. 13, line 7 - 10)

James Kissinger, in a staff meeting, told her (and others) there would be an impending reduction in 2002. (Renda p. 16, line 4 - 19) Renda went on to testify that James Kissinger was one of the individuals who authored the new LINK instructions for managers rating employees in grade 71 to 79. (Renda p. 117, line 16 - 25). There were numerous documents marked in Renda's deposition either authored by James Kissinger or received by both James Kissinger and Renda relating to the new LINK and Alpha Rating system that was to be effective in the first part of 2002. As this Court recognized in the Summary Judgment Order, improper use of the "new" Alpha Rating System, contrary to Sprint's

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Q. AND THEN THE NEXT WOULD BE CARL ATWELL. AND WE'VE ESTABLISHED IN THIS TRIAL THAT HE OBTAINED ANOTHER JOB IN SALES OR MARKETING.

A. YES.

Q. AND NICHOLS, SHE, WAS IN GENE COLEMAN'S GROUP, AS YOU'VE JUST SHOWED ON THE BLOWUP. SHE WAS RIF'D?

A. YES, HER POSITION WAS ELIMINATED.

Q. AND THEN DEB LAW WAS NOT.

A. SHE WAS RETAINED WITHIN MY GROUP.

Q. DEB HANLIN?

A. WAS RETAINED ELSEWHERE IN SPRINT.

Q. THERESA DODSON?

A. RETAINED WITHIN MY GROUP.

Q. AND THEN THERE'S THREE ON HERE WHO WERE MISTAKES BECAUSE THEY WERE ACTUALLY ON SPECIAL PROJECT --

A. THEY WERE ON THAT B2B SPECIAL PROJECT WITH REDDICK AND SOMEHOW GOT ON THIS LIST.

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Q. NOW, THE DESIGNATION ON THIS DOCUMENT WHERE IT SAYS ADVERSE, YOU KNOW THAT SOMETHING THAT'S DONE ALL THE TIME, EVERY TIME THAT THERE IS A REDUCTION, IS THAT THERE IS SOME KIND OF ANALYSIS CALLED AN ADVERSE IMPACT ANALYSIS?

A. YES. I'VE HEARD IT CALLED DUE DILIGENCE AS WELL.

Q. DO YOU KNOW WHAT IT IS?

A. HR AND LEGAL GO THROUGH THE SUBMITTED CHANGES BY THE LINE MANAGERS JUST TO MAKE CERTAIN THERE IS NO APPEARANCE OF ANYTHING UNTOWARD THAT WOULD BE, I SUPPOSE, GENDER OR ETHNICITY, OR AGE-RELATED.

Q. DO YOU KNOW WHETHER OR NOT WHEN THAT DOCUMENT GOES FOR THAT ANALYSIS WHETHER IT SHOWS PEOPLE WHO ARE RIF'D, SUCH AS CARL ATWELL, WHO WE KNOW WERE NOT ACTUALLY RIF'D?

A. I DO NOT KNOW THEIR PROCESS, BUT THEY'RE PROBABLY LOOKING AT THE POSITIONS ELIMINATED WITHIN MY ORGANIZATION. SO FOR THAT PURPOSE, HIS POSITION WAS ELIMINATED AND SO IT VERY WELL MAY HAVE BEEN INCLUDED.

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Q. SO IF IT'S INCLUDED, IF SOMEONE WERE LOOKING TO SEE WHETHER THERE WAS A -- SOME IMPACT ON AGE, HIS YOUNGER AGE WOULD BE INCLUDED TN THAT ANALYSIS?

A. YOU'D HAVE TO ASK HR TO BE SURE OR LEGAL. I DON'T PERFORM THE ANALYSIS.

Q. BUT WHAT YOU DID TELL US IS, IT WOULD BE OKAY TO DO SUCH A CALCULATION AS FAR AS HE WAS RIF'D OUT OF YOUR GROUP, YOU CAN COUNT HIM AS ONE PERSON OUT OF YOUR GROUP?

MR. MONAFO: I WANT TO MAKE SURE WE'RE CLEAR HERE. YOU'RE SAYING HE CAN COUNT IT AS PART OF HIS BUDGET REDUCTION. ARE YOU TALKING ABOUT LEGAL NOW --

Q. (BY MR. EGAN) NO, I'M TALKING ABOUT CAN BE COUNTED AS RIF, LISTED ON A RIF, BECAUSE FOR BUDGET PURPOSES CARL ATWELL IS OUT OF YOUR ORGANIZATION?

A. I FEEL LIKE I NEED TO GIVE A -- SORT OF A FULL EXPLANATION.

Q. SURE.

A. IN REVIEWING -- PREPARING FOR TESTIMONY, I WENT BACK AND RECONSTRUCTED. I STARTED WITH 80 BUDGETED POSITIONS, SEVEN OF THEM WERE NOT FULL AT THE TIME, THERE

WERE NO PERSON IN THOSE BUDGET POSITIONS AS PART OF MY BUDGET AND SIX MOVED TO -- WERE REORGANIZED INTO MARKETING AS PART OF THOSE. SO TAKE THOSE 12 OFF, I HAD 60 REMAINING POSITIONS -- I'M SORRY, 67. AND THEN I RECALL ELIMINATING POSITIONS THAT HAD 12 PEOPLE IN THEM, OF WHICH SOME WERE SUCCESSFUL IN FINDING POSITIONS ELSEWHERE IN SPRINT, AND EIGHT, TO THE BEST OF MY KNOWLEDGE, LEFT THE EMPLOY OF ALL OF SPRINT.

* * *

Q. AND BY THIS TIME IN NOVEMBER OF 2002, PAUL REDDICK WAS INVOLVED IN THE DECISIONS IN THE NOVEMBER TIME FRAME IN WHICH YOU HAD TO DO THE REDUCTION IN FORCE, IS THAT CORRECT?

A. YES, I INVOLVED ALL THREE OF MY REMAINING DIRECT REPORTS.

Q. WHEN DID YOU INVOLVE PAUL REDDICK?

A. I DO NOT REMEMBER THE EXACT DATE, BUT I DO KNOW IT WAS AFTER HAVING ALREADY MADE THE DECISION TO TERMINATE REINHARDT AND ELSTER AND REORGANIZE INTO JUST THREE GROUPS.

Q. OKAY. SO YOU INVOLVED PR, PAUL REDDICK, IN THE RIF PROCESS AFTER ELSTER AND REINHARDT WERE TERMINATED, WHICH MEANT --

A. NO, NO, NO. BEFORE. THEY HAD NOT BEEN NOTIFIED. BUT I MADE THAT DECISION SO WE MET PRIVATELY FOR A FEW AWKWARD DAYS BEFORE FINALIZING THE DECISIONS OF HOW THE NEW THREE PART ORGANIZATION WOULD BE MANAGED. AND THEN ON A ORCHESTRATED DAY I INFORMED THOSE TWO PEOPLE AND OTHER PEOPLE WERE INFORMED BY OTHERS.

Q. OKAY. AND I'M TRYING TO PUT UP WHAT YOU TOLD US IN A VERY SUMMARY FASHION. YOU INVOLVED REDDICK IN THE RIF PROCESS AFTER THE ELSTER AND REINHARDT DECISION HAD BEEN MADE?

A. YES.

* * *

Q. AFTER THE MANDATE FROM MR. LAUER TO REDUCE YOUR BUDGET, I BELIEVE YOU TESTIFIED THAT THE FIRST THING YOU DID IS YOU REDUCED THE NUMBER OF VICE-PRESIDENTS REPORTING TO YOU FROM FIVE TO THREE, DO YOU RECALL THAT?

A. YES, I RECALL THAT. BUT I BELIEVE I SAID FIRST I THOUGHT ABOUT WHAT FUNCTIONS WE FULFILL AND ARE ANY OF THOSE THINGS WE JUST STOP DOING IN ORDER TO REDUCE THE WORKLOAD BUT THEN ALLOWS US TO REDUCE THE LABOR.

Q. THANK YOU.

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A. AFTER THINKING ABOUT THAT, THEN I DECIDED TO ELIMINATE THE REINHARDT AND ELSTER POSITIONS.

Q. AND LET ME PUT BEFORE YOU EXHIBIT 17, THE DISPLACEMENT GUIDELINES. AND WE'LL PUT THAT UP ON THE MONITOR HERE.

A. I STILL HAVE A HARD COPY.

Q. AT THE TOP, MR. BLESSING, DOES IT SAY, "THESE GUIDELINES FOR SELECTING EMPLOYEES FOR REDUCTION ARE LISTED IN DESCENDING ORDER OF IMPORTANCE"?

A. YES.

Q. AND DID YOU DETERMINE WHAT POSITIONS WOULD BE UNAFFECTED AND THEN WHICH POSITIONS WOULD BE AFFECTED? I THINK YOU SAID THAT'S THE FIRST THING YOU DID.

Q. YES. I CALL FUNCTIONS OR WHAT WORKLOAD ARE WE GOING TO CONTINUE DOING OR STOP DOING. AND THEN IT WASN'T UNTIL AFTER YOU DID THAT ANALYSIS THAT YOU MOVED DOWN AND STARTED TO FIGURE OUT WHO WAS GOING TO PERFORM THE REMAINING FUNCTIONS?

A. YES.

* * *

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Q. AND IF I REPRESENTED YOU TO THAT MR. CARRITHERS WAS 55 YEARS OLD, DOES THAT SEEM RIGHT TO YOU?

A. WELL, YES, HE HAS GRAY HAIR. I KNOW FROM PREPARING FOR THE TRIAL THAT BOTH STEVE AND VICKIE WALTON WERE OVER 50 AND THEY MOVED INTO THE REDDICK ORGANIZATION, DOUBLING THE NUMBER OF PEOPLE IN HIS ORGANIZATION OVER 50 AFTER THE REORGANIZATION THAN HAD BEEN IN HIS ORGANIZATION PRIOR TO THE REORGANIZATION -- THAN THE RIF.

Q. AND CONNIE KENNEDY, I THINK SHE WAS ALSO OVER 50. SHE STAYED WITHIN SPRINT, IS THAT RIGHT?

A. YES.

* * *

Q. AND IS IT A FACT, THEN, THAT AS PART OF THIS REDUCTION IN FORCE AND REORGANIZATION, THE TWO OLDEST ADMINISTRATIVE ASSISTANTS WERE NOT IMPACTED NEGATIVELY BY THE RIF?

A. THAT'S CORRECT.

Q. IN FACT, MR. BLESSING, IN EACH LEVEL OF JOB -- JOB LEVEL, VICE-PRESIDENT, DIRECTOR, MANAGER, ANALYST, ADMINISTRATIVE ASSISTANT,

Appendix S

THE OLDEST PERSON IN THAT JOB LEVEL SURVIVED THE RIF, ISN'T THAT TRUE?

A. YES, UPON REVIEW, I NOW KNOW THAT TO BE TRUE.

TRIAL TESTIMONY FROM JANUARY 11, 2005
(WITNESS: PAUL REDDICK)

* * *

Q. . . . OF ALL OF THESE FOLKS, WOULD ELLEN MENDELSOHN HAVE BEEN THE OLDEST AMONG ALL OF THESE INCUBATORS WHO REMAINED AFTER THE RIF?

A. IF I COULD JUST SEE IT A LITTLE CLOSER.

Q. SURE.

A. SO THE QUESTION IS, IF SHE WOULD HAVE STAYED, WOULD SHE HAVE BEEN THE OLDEST MEMBER?

Q. YES.

A. I DON'T THINK SO.

Q. WHO WOULD HAVE BEEN?

A. I THINK STEVE CARRITHERS. AND THEN I THINK VICKIE WALTON.

Q. WAS CARRITHERS AN INCUBATOR AFTERWARDS?

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A. YES. SO, I MEAN, I DIDN'T KNOW THE AGE OF THE EMPLOYEES WHEN WE HAD THE RIF, BUT I DO KNOW THAT I HAD ONE EMPLOYEE OVER 50 BEFORE THE RIF AND I HAD TWO EMPLOYEES OVER 50 AFTER THE RIF. AND THAT WAS VICKIE WALTON AND STEVE CARRITHERS.

* * *

Q. WERE ANY -- ALL THE DECISIONS MADE REGARDING REDUCTION IN FORCE MADE AT THE VICE-PRESIDENT LEVEL, AND UP?

A. YEAH, WITHIN BILL BLESSING'S ORGANIZATION THERE WERE FOUR INDIVIDUALS, MYSELF, BENNETT GAMEL, STEVE FALK AND BILL BLESSING.

Q. DID ANY OF THE OTHER DIRECTORS IN THE GROUP MAKE THE REDUCTION IN FORCE DECISIONS?

A. NO. AND I'LL JUST CLARIFY. NOT DIRECTLY. I WOULD HAVE INDIRECTLY GONE AND SAID, HOW ARE THESE PEOPLE PERFORMING? BECAUSE I KNEW I HAD TO MAKE DECISIONS AND I COULDN'T EXPLAIN TO THEM WHAT THOSE DECISION WERE GOING TO BE.

* * *

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Q. EVERYTHING TO THE LEFT OF DOUG REINHARDT, SINCE REINHARDT AND ELSTER WERE GONE, YOU WERE MAKING THE DECISIONS ON WHO WOULD STAY AND WHO WOULD GO?

A. YEAH. I MADE DECISIONS SPECIFICALLY ON WHO WOULD STAY AND GO IN MY GROUP AND THEN ONCE -- BILL HELPED ON, YOU KNOW, SAYING WHAT WE WERE DOING WITH ELSTER'S AND REINHARDT'S GROUP, THEN I HAD AN OPTION TO SAY DO I WANT TO TAKE SOME CANDIDATES FROM THOSE GROUPS AS WELL.

Q. OKAY. AND DOUG REINHARDT'S GROUP INCLUDED STEVE CARRITHERS, CONNIE KENNEDY AND VICKIE WALTON. THE JURY HAS SEEN MULTIPLE TIMES AN EXHIBIT THAT TALKS ABOUT STEVE CARRITHERS BEING 55 YEARS OLD AND CONNIE KENNEDY AND VICKIE WALTON BEING 51. WHAT DID YOU DECIDE TO DO WITH THESE PEOPLE WHO WERE ORPHANS, AS YOU PUT IT?

A. I DECIDED TO PICK ALL THREE OF THEM UP. I WANTED TO PLACE THEM IN DIFFERENT PARTS OF MY ORGANIZATION. I WAS TOLD THAT CONNIE KENNEDY WAS GOING TO GET A POSITION IN THE BUSINESS SIDE SO THAT I SHOULDN'T TAKE HER, SHE WAS ALREADY GOING TO RE PLACED. BUT I DECIDED TO PICK UP VICKIE AND STEVE.

Q. AND DID CONNIE KENNEDY GET THAT JOB IN THE BUSINESS SIDE?

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A. YEAH. ACTUALLY I HELPED HER BECAUSE I TOLD THEM I WANTED TO PURSUE HER AT ONE TIME, THEN WAS TOLD NOT TO, AND THEN SHE AT ONE POINT WAS WITHOUT A JOB BECAUSE THE OTHERS -- THE OTHER GROUPS SAID THEY DIDN'T WANT TO PICK HER UP. SO WE HAD LUNCH AND JUST KIND OF CHATTED THROUGH DIFFERENT OPTIONS FOR IT AND SHE ENDED UP FINDING A DIFFERENT POSITION, DID END UP ON THE BUSINESS SIDE WITH THE CONSUMERS.

Q. IF YOU WANTED TO GET RID OF OLDER EMPLOYEES IN THE REDUCTION IN FORCE, COULD YOU HAVE LET GO STEVE CARRITHERS AND CONNIE KENNEDY AND VICKIE WALTON?

A. YES.

Q. THAT WAS YOUR DECISION?

A. I COULD HAVE LET THEM GO.

* * *

Q. AND DID YOU KEEP UP ON THE RELATIVE PERFORMANCE OF THE EMPLOYEES AND WHAT WAS GOING ON?

A. YES, SPECIFICALLY, MY DIRECTORS.

Q. DID YOU SELECT ELLEN MENDELSOHN FOR INCLUSION IN THE REDUCTION IN FORCE?

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A. YES, I DID.

Q. WAS THAT YOUR DECISION?

A. YES, THAT WAS MY DECISION.

Q. AND WHY DID YOU DECIDE TO INCLUDE HER?

A. BECAUSE SHE WAS A POOR PERFORMER. I DIDN'T CHOOSE TO EXCLUDE HER BECAUSE OF HER AGE.

* * *

Q. DID THE SALARIES OF BDS GO UP AS A RESULT OF THE REDUCTION IN FORCE?

A. NO, THAT WOULD HAVE BEEN REALLY CONTRARY TO THE WHOLE DIRECTIVE WE WERE GIVEN TO REDUCE OUR COSTS BY 30%.

Q. AND IS THAT WHAT YOU DID?

A. YES. THAT'S WHAT HE DID. BY REDUCING LABOR COSTS BY ABOUT 25%. AND I THINK THE NUMBERS ARE ALL -- WE REDUCED HEAD COUNT FROM 75 DOWN TO 57 IN THE ENTIRE GROUP.

* * *

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Q. AND IN MAKING YOUR DECISIONS DID YOU SOLICIT INPUT FROM JAMES FEE AND YOUR OTHER DIRECTORS?

A. YES, I DID.

Q. WHAT TYPE OF INPUT DID YOU SPECIFICALLY SOLICIT FROM HIM DIRECTLY IN CONNECTION WITH THE REDUCTION?

A. SO SINCE I HAD SOME RECENT KNOWLEDGE, YOU KNOW, UP THROUGH JULY, ON HOW PEOPLE WERE PERFORMING, WHAT I WAS MOST CONCERNED ABOUT WAS MAKING DECISIONS ON BEHALF OF MY DIRECTORS WITHOUT KIND OF MORE RECENT INFORMATION, IF ANYTHING HAD CHANGED, SO I KIND OF SPECIFICALLY ASKED, HOW'S IT GOING WITH SPECIFIC INDIVIDUALS? I KNOW THEIR PERFORMANCE ISSUES, ARE THOSE THINGS IMPROVING? IS IT GETTING BETTER, WORSE, OTHERWISE? BECAUSE THAT WAS THE EXTRA INFORMATION I WAS GOING TO HAVE TO TAKE IN TO MAKE THESE DECISIONS.

* * * *

APPENDIX T — PLAINTIFF'S OFFER OF PROOF REGARDING SIMILARLY SITUATED EMPLOYEES TERMINATED AS PART OF A REDUCTION IN FORCE DATED JANUARY 11, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN MENDELSOHN

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

PLAINTIFF'S OFFER OF PROOF REGARDING SIMILARLY SITUATED EMPLOYEES TERMINATED AS PART OF A REDUCTION IN FORCE

Pursuant to Fed.R.Evid. 103(a)(2), Plaintiff makes the following offer of proof in the form approved by the court.[1]

Background

In Plaintiff's Rule 26(a) disclosures served in this case, she identified a number of individuals who she claimed would be able to give testimony supporting her claims. Specifically,

1. The court has apparently exercised its discretion, pursuant to Fed.R.Evid. 103(b), not to require Plaintiff's offer of proof in "question and answer form."

she identified several former employees of Sprint who, although they did not work in the same distinct work group that she worked in, were nevertheless terminated in roughly the same time frame (late 2002 and early 2003) and under similar circumstances. Sprint took the depositions of several of these individuals and the testimony of some of these individuals was offered in response to Sprint's summary judgment motion.

The court has ruled that employees outside of the Business Development and Strategy (BDS) organization in which Plaintiff was last employed will not be permitted to testify about their terminations. Accordingly, Plaintiff sets forth below the substance of the evidence that plaintiff intended to offer through these witnesses, pursuant to F.R.Evid. 103(a)(2).

BONNIE HOOPES

Bonnie Hoopes was born in 1955. (B. Hoopes, p. 5).[2] She worked for Sprint from 1984 to 1995, was rehired in 1997 and was terminated (the same day as Ellen Mendelsohn) November 22, 2002. (B. Hoopes, pp. 10; 18; 20; 30-31; 49-50). In her last position, Mrs. Hoopes worked at "the PCS building at College and Lowell." (Id, at 24). Mrs. Hoopes was told her job was being eliminated. (B. Hoopes, pp.50-51). However, Mrs. Hoopes' job duties were assumed by three different individuals, Toyiah Cavole (early 30's), Rob Hisle

2. References are to the deposition of Bonnie Hoopes, taken on April 24, 2004, by defendant Sprint. Relevant portions of this deposition were attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

(40's), and another young female (30's) whose name she cannot recall. (B. Hoopes, pp. 32; 58-61). In 2002, Mrs. Hoopes heard comments about "there being a lot of young people in our group" and "that I was the oldest," and " I had the most seniority." (B. Hoopes, pp. 82-83). Mrs. Hoopes testified she was discriminated against because of her age because she was over 40 when she was terminated, because she had taken disability leave, and because her former supervisor, Sharon Vorhies, "told me I was too old for the job." That was in February, March 2002. (B. Hoopes p. 92-95). Sharon Vorhies also gave Hoopes an e-mail in February of 2002, around the time of the roll out of the "alpha" rating system, citing Jack Welch's book and indicating a preference for employees "blessed with lots of runway ahead of them." (See Exhibit A attached).

YVONNE WOOD

Yvonne Wood was born in 1951. (Wood, p. 5).[3] Ms. Wood was employed at Sprint from November, 1996 until her termination in Sprint's RIF on January 15, 2003. (Wood, pp. 8; 39). Like Ms. Mendelsohn, Ms. Wood worked in Sprint PCS. (Id., 20-21). Ms. Wood testified that her termination on January 15, 2003 was based on her disability, the fact that she was a woman, and her age. (Wood, pp. 39; 43;112-113). Ms. Wood so testified because in January 2003, she accidentally received a copy of a spreadsheet from a supervisor, Dan Kennedy, that indicated that age, race and

3. References are to the deposition of Yvonne Wood, taken on April 22, 2004, by defendant Sprint. Relevant portions of this deposition were attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

sex were considered in selection decisions. This spreadsheet was created in March, 2002, by a Mr. Dienhart. The spreadsheet was titled something like layoffs and RIFs. (Wood, pp. 48-51; 77-78). Ms. Wood further testified that she knows plaintiff Ellen Mendelsohn and Sharon Miller filed suit claiming they were terminated because of their age. (Wood, pp. 104-105; 109-110). Sharon Miller (whose testimony is discussed below) told Ms. Wood that Ted Stock described Ms. Wood's group as "a bunch of old, sick people." (Wood, pp.71; 75-76). Ms. Wood also testified that she believed Sprint's intern program (the Staff Associate Program) constituted age discrimination, in that Sprint would bring in young individuals, right out of college, and put them on a fast track to fill management positions, and in Ms. Wood's particular case, trained them to do her job. (Wood, pp. 71-74; 115):

A. They brought in an intern and he was going to be doing my job.

* * *

A. They sent him to D.C. to be trained for my job and would not give me training. (Id. at 72).

SHARON MILLER

Sharon Miller was born in 1950. (Miller, p. 6).[4] She was employed at Sprint off and on from March, 1990 to April, 1996, and then was rehired by Sprint in October, 2002, only to be terminated in November 21, 2002 (within a day of Plaintiff

4. References are to the deposition of Sharon Miller, taken on April 23, 2004, by defendant Sprint. Relevant portions of this deposition were attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

Mendelsohn). (Miller, pp. 8-11; 18; 60; 87). Like Plaintiff Mendelsohn, Bonnie Hoopes, and Ms. Wood; Sharon Miller also worked in Sprint PCS. During Ms. Miller's employment with Sprint, Sprint Manager Ted Stock frequently made age-derogatory comments directly to Ms. Miller — and to other senior managers — that he felt he had "too many older people," and ailing "old, sick, people" in his department. Miller testified that Stock referred to, and specifically gave as examples of the "old"/"sick" employees Mark Craigin, Carolyn Selberg and Yvonne Wood. (Miller, pp. 25-26; 29-33; 41; 45-47; 50; 58). Stock also told Ms. Miller numerous times about his concerns about a couple of other employees who had medical issues "and who were older," and Stock commented to Ms. Miller about waiting for layoffs so "he could clean up his department." (Miller, pp. 27; 59). When Ms. Miller wanted to hire an older gentleman into an open position for Sprint, Miller testified Ted Stock told her he would "like to see someone a little younger in the job." (Miller, pp. 28; 50-51; 53; 59). One time when an employee had to take off work due to an accident, Ms. Miller testified that Ted Stock instructed her that once the employee returned to work, she was to "build a case" against him, so that Mr. Stock would have evidence to fire him. (Miller, pp. 26; 41; 45-46; 58).

JOHN BOREL

John Borel. Mr. Borel was born in 1947. (Borel, p. 5).[5] After spending 30 years in the Army, Mr. Borel worked at Sprint as Project Manager III from November, 2000 until his

5. References are to the deposition of John Borel, taken on April 19, 2004, by defendant Sprint. Relevant portions of this deposition were attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

termination, due to RIF, on February 26, 2003. (Borel, pp. 10; 12; 21; 33). Mr. Borel has filed a lawsuit against Sprint claiming his termination was based on his age. (Borel, p. 96). Mr. Borel claims his termination was based on his age, in part based on the fact that a week before he was notified he was being laid off, Borel went to talk to a manager, Jay Cole, about a vacant Project Manager position open in Mr. Cole's department. Mr. Cole told Mr. Borel "he thought I would be a very good fit for the job and he wanted me on his team." (Borel, at 27). When Mr. Borel was terminated a week later on February 26, 2003, Mr. Borel formally applied for the position. Mr. Cole then told Mr. Borel, "I was not allowed to put in for this because I had been banned and that I had an adverse performance rating in my file." (Id. at 20). Borel later found out a young female was placed in the position. (Borel, pp. 20-23; 31-32). When Mr. Borel was terminated on February 26, 2003, he was told his termination was not based on his performance, but was based on his position being eliminated. (Borel, pp. 36; 95-96). Later Mr. Borel found out that, unbeknownst to him, he had been given an adverse performance rating, even though there had been no mention before his termination of anything wrong with his performance. (Borel, pp. 39-40). Mr. Borel also found out that younger female, Deanne Patton, was moved into his position after his termination to perform his job duties. She had just been displaced from her team that had been laid off. (Borel, pp. 32; 81; 94). When Mr. Borel contacted his supervisor, Janet Mathus, after his termination, and after he found out he had been given an adverse rating, Ms. Mathus admitted to Mr. Borel that, "my performance was not adverse at all and that she was forced to give me that rating" by Mohammad Hussain. (Borel, p. 42). Mr. Borel testified that he witnessed another older employee being harassed because of her age, Carol Kippes.

Ms. Kippes told him she was laid off the same day she returned to work after being out on medical leave and she told him she felt she had been terminated because of her age. (Borel, pp. 75-76; 78; 92). Borel also testified that after his termination, he told Rene Latta, HR representative with Sprint, that he felt he was discriminated against based on his age. (Borel, pp. 79-80).

JOHN HOOPES

John Hoopes, Jr. Mr. Hoopes was born in 1949. (J. Hoopes, p. 5).[6] Mr. Hoopes worked for Sprint from February 15, 1986 through February 8, 2002. (J. Hoopes, pp. 6-7; 25). As he approached his 53rd birthday Hoopes became the only individual terminated under the supervision of Terri Reynolds. (J. Hoopes, p. 29). Mr. Hoopes was told by Ms. Reynolds that an "alpha" rating had been assigned to him, but Ms. Reynolds did not know what it was. (J. Hoopes, p. 37). Mr. Hoopes' job duties were assumed by a younger female manager, who did not have any experience in call center technology. (J. Hoopes, pp. 34-36). During Mr. Hoopes' employment with Sprint, when he tried to hire an individual over the age of 40, he had to get his Vice President's approval. (J. Hoopes, pp. 57; 60). After his termination, from February 2002 through February 2003, Mr. Hoopes applied for "bonafide" open positions at Sprint through Sprint's outplacement service, Right Management. Although he applied for at least 5 jobs each Tuesday and Thursday, sometimes "15 to 20 jobs on those days," he was never offered another position, despite his qualifications. (J. Hoopes,

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6. References are to the deposition of John Hoopes, taken on April 24, 2004, by defendant Sprint. Relevant portions of this deposition were attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

pp. 41-44). Mr. Hoopes noticed that "the vast majority" of the former Sprint employees who attended Right Management were over the age of 40. (J. Hoopes, pp. 43-44). Mr. Hoopes claims he was discriminated against by Sprint because of his age. (J. Hoopes, pp. 51-54).

Respectfully submitted,

THE POPHAM LAW FIRM, P.C.

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ATTORNEYS FOR PLAINTIFF

APPENDIX T-1 — EXHIBIT A
EMAIL FROM SHARON VORHIES
TO BONNIE HOOPES
DATED FEBRUARY 26, 2002

Hoopes, Bonnie
From: Vorhies, Sharon
Sent: Tuesday, February 26, 2002 6:58 AM
To: Grant, Sarah; Hoopes, Bonnie; Lange, Shelli; Niezer, Jennifer; Zilar, Sherri
Subject: Quote

Here's a larger portion of the quote from Jack Welch's book that Susan read yesterday. I really think this captures the differentiating factors for each of us and our staff. The fourth E is obviously very key, we need people to consistently execute and deliver.

> Differentiation comes down to sorting out the A, B, and C players.
>
> The A's are people who are filled with passion, committed to making things happen, open to ideas from anywhere, and blessed with lots of runway ahead of them. They have the ability to energize not only themselves, but everyone who comes in contact with them. They make business productive and fun at the same time.
>
> The have what we call "the four Es of GE leadership": very high *energy* levels, the ability to *energize* others around common goals, the *edge* to make tough yes-and-no decisions, and finally, the ability to consistently *execute* and deliver on their promises.

Appendix T-1

We actually started with three Es: energy, energize, and edge. When we did our first Session Cs appraising people based on these Es, we saw several managers with plenty of energy, the ability to energize their teams, and a lot of edge. As we went from business to business, we kept running into one or two who met the three E criteria but didn't look very good to us. Before we got home, we decided we were missing something. What these managers were lacking was the ability to deliver the numbers. So we added the fourth E - execute. That did it.

Sharon Vorhies
Director-CS Enterprise Project Integration Office
(913) 253-4369

APPENDIX U — DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S OFFER OF PROOF REGARDING SIMILARLY SITUATED EMPLOYEES TERMINATED AS PART OF A REDUCTION IN FORCE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED JANUARY 12, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Cause No. 03-CV-02429-KHV-DJW

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S OFFER OF PROOF REGARDING SIMILARLY SITUATED EMPLOYEES TERMINATED AS PART OF A REDUCTION IN FORCE[1]

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1. Sprint incorporates herein the arguments and citations set forth in its Motion in Limine, Memorandum in Support, and Reply to Plaintiff's Memorandum in Opposition regarding the impropriety of testimony from others who were not similarly situated with Plaintiff. (Docs. Nos. 78, 79, 101)

Appendix U

INTRODUCTION

Defendant Sprint/United Management Company ("Sprint") opposes Plaintiff's Offer of Proof Regarding Similarly Situated Employees Terminated as Part of a Reduction in Force. This Court has already determined that evidence regarding others' separations shall be excluded when such others are not "similarly situated." (Doc. 111, Docket Order) The Court defined "similarly situated" for purposes of its ruling by requiring proof that Paul Reddick was the decision-maker in the adverse employment action *and* temporal proximity. *Id.* Simply put, the witnesses identified by Plaintiff in her offer of proof are *not.*

INDIVIDUAL PROSPECTIVE WITNESSES

Bonnie Hoopes[2]

Although Ms. Hoopes was separated from Sprint in approximately the same time period as Plaintiff, there is no evidence Paul Reddick made the decision to separate her employment. Ms. Hoopes was told by her supervisor, Chrystal Cone (in her 40's), that her employment with Sprint as a Senior Manager Strategic Initiatives was being separated.

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2. As with all of the individuals identified in Plaintiff's Offer of Proof, Sprint denies it discriminated against Ms. Hoopes. However, these individuals' testimony regarding their individual experiences is not relevant to this Memorandum in Opposition because the individuals identified by Plaintiff are not similarly situated for purposes of providing testimony in this matter. Accordingly, for the sake of brevity, Sprint does not address the individual claims of age discrimination cited by Plaintiff in her Offer of Proof.

(Ex. A, B. Hoopes, 22: 16: - 23: 20; 38: 25 - 49: 14; 40: 24 - 41:2; 49: 23 - 25) Ms. Cone reported to Allen Winters, who in turn reported to Tony Castanon. (Ex. A, B. Hoopes, 39: 24 - 40:9). Ms. Hoopes was *not* in Paul Reddick's chain of command at the time of her separation of employment from Sprint. In particular, Ms. Hoopes testified she never worked under Jim Fee or Paul Reddick. (Ex. A, B. Hoopes, 111: 6 - 14)

There is simply no other evidence that Ms. Hoopes and Plaintiff were similarly situated. For example, Ms. Hoopes did not know the name of the organization that employed Plaintiff. (Ex. A, B. Hoopes, 110: 21 - 23) Moreover, other than understanding Ms. Hoopes performance feedback had been unfavorable, Ms. Hoopes knew *nothing* of the terms and conditions of Plaintiff's employment, including her job title and compensation. (Ex. A, B. Hoopes, 110: 5-10; 110: 13 - 15; 110: 20-22).

Yvonne Wood

Ms. Wood was terminated from her position in January, 2003, which was several months *after* Plaintiff's separation. Perhaps more importantly, Ms. Wood did not work in Paul Reddick's chain of command. At the time of her separation, Ms. Wood reported to Roberta King, who in turn reported to Ted Stock. (Ex. B, Wood, 27: 2 - 8, 31: 4 - 6) Mr. Stock reported to Mike Miller who, in turn, reported to Jerry Batt. (Ex. B, Wood, 31: 7 - 14). Again, there is simply no evidence Ms. Wood worked under Paul Reddick.

Appendix U

As with Ms. Hoopes, Ms. Wood knows nothing about Plaintiff other than she has filed a claim alleging age discrimination. (Ex. B, Wood, 14: 20 - 25; 108: 13 - 16) Ms. Wood was only made aware of Plaintiff's claim through her counsel, who also represents Plaintiff in this matter. (Ex. B, Wood, 108: 13 - 18) Ms. Wood knows nothing more regarding Plaintiff, including *any* of the terms and conditions of her employment, such as her last job title, compensation, the organization she worked in, who she reported to, her performance rating, etc. (Ex. B, Wood, 108: 19 - 109: 16). In fact, Ms. Wood does not know Plaintiff, nor has she spoken with her. (Ex. B, Wood, 109: 17 - 22).

Sharon Miller

As with the others referenced in Plaintiff's offer of proof, Ms. Miller is not similarly situated to Plaintiff. In particular, Ms. Miller never worked under Paul Reddick; Ms. Miller reported to Noel Strong. (Ex. C, Miller, 70: 24 - 71: 22) In fact, Ms. Miller does not even know which organization Plaintiff worked in while employed by Sprint, nor does she know the individual to whom Plaintiff reported to at the time of her separation. (Ex. C, Miller, 122: 18 - 22).

Ms. Miller, like the others identified in Plaintiff's offer of proof, has no knowledge of Plaintiff's terms and conditions of employment at Sprint. (Ex. C, Miller, 122: 7 - 10; 122: 14 - 17; 122: 23 - 123: 8). Ms. Miller never interacted with the Sprint PCS Business Development & Strategy group (i.e., Plaintiff's group). (Ex. C, Miller, 123: 15 - 24) Likewise, she does not recall ever meeting, speaking, or interacting

with Plaintiff. (Ex. C, 122: 10 - 13; 123: 9 - 14; 124: 10 - 12) Under the circumstances, Ms. Miller is clearly not similarly situated.

John Borel

Mr. Borel, like all of the others cited by Plaintiff in her offer of proof, is not similarly situated with Plaintiff. Mr. Borel's employment as a Project Manager III in the STIC Lab was separated on February 26, 2003, more than four months after Plaintiff's employment was separated. (Ex. D, Borel, 11: 22 - 12: 6; 13: 2 - 8; 22: 1 - 2) Moreover, Mr. Borel never reported to Mr. Reddick. At the time of his separation of employment, Mr. Borel reported to Janet Mathus, who in turn reported to Mohammad Hussain. (Ex. D, Borel, 18: 16 - 19: 16) Mr. Hussain reported to an individual named Mihwa, who in turn reported to Dennis Huber. (Ex. D, Borel, 19: 23 - 20: 6)

Like all of the others, Mr. Borel knows nothing about Ms. Mendelsohn's employment at Sprint, including her job title, job grade, length of service, the organization she worked in, etc. (Ex. D., Borel, 99: 9 - 100: 3). Mr. Borel does not "personally" know Plaintiff. (Ex. D., Borel, 100: 12 - 13) Nevertheless, Mr. Borel believes Plaintiff has been subjected to discrimination regarding her separation of employment from Sprint. (Ex. D., Borel, 99: 24 - 100: 13)

Mr. Borel is clearly not similarly situated with Plaintiff yet he feels qualified to opine that Plaintiff was subjected to age discrimination at Sprint. Mr. Borel's willingness to speculate regarding Plaintiff's claims demonstrates the

danger in allowing those without relevant information regarding Plaintiff's separation to testify in this case.

John Hoopes

John Hoopes is also not similarly situated with Plaintiff for the purpose of testifying at trial in this matter. Mr. Hoopes was separated from his position at Sprint in February, 2002, more than nine before Plaintiff's separation of employment. (Ex. E, J. Hoopes, 7: 25 - 8: 1; 25: 11 - 18) Furthermore, Mr. Hoopes did not work in Paul Reddick's chain of command. Instead, he worked under Terri Reynolds.[3] (Ex. E, J. Hoopes, 17: 2- 6) As with the others Mr. Hoopes has no information about Plaintiff's employment and separation of employment at Sprint, including, among other things, her job title, job grade, and the organization that she worked in when her employment was separated. (Ex. E, J. Hoopes, 66: 1 - 67: 11) Mr. Hoopes never worked with Sprint PCS Business Development & Strategy (i.e., Plaintiff's work group), nor did he have an opportunity to observe Plaintiff's performance. (Ex. E, J. Hoopes, 66: 23 - 67: 8) As with the others listed above, Mr. Borel's purported testimony is not relevant and he is not similarly situated with Plaintiff.

3. Mr. Hoopes does not recall who his director was the time of his separation of employment. (Ex. E, J. Hoopes, 26: 10- 12)

Appendix U

CONCLUSION

Plaintiff has failed to demonstrate *any* of the individuals identified in her offer of proof are similarly situated for purposes of testifying in this matter. In particular, several of the individuals were separated well before or after Plaintiff. More importantly, *none* of these individuals were in Paul Reddick's chain of command. Finally, the individuals identified in the offer of proof know nothing of the terms and conditions of Plaintiff's employment or separation from employment. Accordingly, these individuals' testimony is irrelevant and will only serve to confuse the jury regarding the sole issue in this case: whether *Plaintiff* was subjected to age discrimination.

Respectfully submitted

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Appendix U

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ATTORNEYS FOR DEFENDANT SPRINT/UNITED MANAGEMENT COMPANY

APPENDIX U-1 — EXHIBIT A
EXCERPTS FROM DEPOSITION TRANSCRIPT
DATED APRIL 22, 2004
(YVONNE WOOD)

[Commencing at Page 29]

* * *

Q. Who supervised you after Maureen McGuire was no longer supervising your employment as data analyst III?

A. Roberta King.

Q. How long did Roberta King supervise your employment?

A. Max, six months to a year, at the most.

Q. Was Roberta King an employee of Sprint at the time she supervised your employment?

A. Yes.

Q. Do you know what her job title was?

A. No.

Q. Do you know what her job grade was?

A. No.

Q. Do you know what Ms. King's age was at the time she supervised your employment?

A. I believe she was thirty-nine when she [30] started.

Q. When you say started, you mean started supervising your employment?

A. Yes. She had a birthday, that's why, and she turned forty.

Q. She turned forty while she was supervising your employment?

A. Yes.

Q. If I understand you correctly, Roberta King was the last person who supervised your employment while you were employed at Sprint?

A. Yes.

Q. Did Sharon Miller have a point of contact or somebody who she reported back to at Sprint while she was a contractor supervising your employment?

A. A person who worked for Sprint, you mean?

Q. Yes.

A. Yes, Ted Stock.

Q. Who did Maureen McGuire work for while she supervised your employment; do you know?

A. Ted Stock.

Q. Do you know who Mr. Stock reported to at the time that Maureen McGuire reported to him, while she supervised your employment?

[31] A. We had a vice president who was young and in his thirties, and I can't remember his name. That was before Mike Miller.

Q. Do you know who Roberta King reported to at the time she supervised your employment?

A. Ted Stock.

Q. Do you know who Ted Stock reported to at the time Roberta King supervised your employment?

A. That would be Mike Miller.

Q. Do you know who Mike Miller reported to at the time Roberta King supervised your employed?

A. I presume Jerry Batt.

Q. Do you know for sure?

A. No.

Q. Did the group that reported up to Ted Stock have a name of any sort? Was it identified as a particular work group at Sprint?

A. They changed names a lot, so I didn't pay much attention to it. Offhand, I don't recall.

Q. While you were employed at Sprint, did other individuals transfer in and out of your work group?

A. Yes.

Q. Was that true of people who were over forty as well as those who were under forty?

[32] A. Yes.

Q. How many individuals transferred in and out of the groups that you worked in?

A. I have no way of knowing that.

Q. When I say work groups, do you understand I mean up to your director level?

A. I presumed that.

Q. How many data analyst III's were there at the time your employment was separated that reported up to Roberta King?

A. I believe just me.

Q. Do you know how many data analyst III's reported up to Ted Stock at the time of your separation of employment?

A. No, I do not.

* * *

[106] Q. Ms. Wood, do you claim that Sprint maintained any discriminatory policies?

A. Not that I'm aware of, not official ones.

Q. Are you aware of any unofficial policies that Sprint has that are discriminatory because of people's ages?

A. I don't know how to answer that. Except by actions, no.

Q. Are you aware of any procedures at Sprint that are discriminatory against employees because of their age?

A. I'm not aware of.

Q. Are you aware of any practices by Sprint that are discriminatory because of people's ages?

A. Offhand, no.

* * *

[108] * * *

Q. Previously you mentioned you were aware that Ellen Mendelsohn had raised complaints of age discrimination; is that right?

A. Yes, that's right.

Q. How were you aware of that?

A. I was told by the attorneys.

Q. Do you know Ellen Mendelsohn's last job title at Sprint?

A. No idea.

Q. Do you know what her last job period was at Sprint?

A. No idea.

Q. Do you know what organization she worked?

[109] A. No idea.

Q. Do you know who she reported to?

A. No idea.

Q. Do you know what location she worked in?

A. No.

Q. Do you know if she was exempt or non-exempt employee?

A. No idea.

Appendix U-1

Q. Do you know what her performance ratings were?

A. No, I don't.

Q. Do you know what her compensation was?

A. No.

Q. Do you know Ellen at all?

A. No.

Q. Have you ever met her?

A. Not that I know of.

Q. Have you ever spoken with her?

A. Not that I know of.

* * *

[111] * * *

Q. Do you know how the decision was made that Ellen Mendelsohn's employment was terminated?

A. No.

* * * *

APPENDIX U-2 — EXHIBIT B
EXCERPTS FROM DEPOSITION TRANSCRIPT
DATED APRIL 24, 2004
(BONNIE L. HOOPES)

[Commencing at Page 21]

Q. And what position were you rehired into in March of '97?

A. Quality manager.

Q. How long did you hold the position of quality manager at Sprint?

A. Approximately two years.

Q. So at some point in time in 1999?

A. Yes.

Q. What was your next role at Sprint following your role as a quality manager?

A. Program manager for Y2K.

Q. And was the change in jobs from quality manager to program manager in Y2K a promotion?

A. No.

Q. Was it a demotion?

A. Yes.

Appendix U-2

Q. Your age at that time would have been 44 years old; is that right?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Were you given any awards for your role in Sprint's Y2K compliance efforts?

A. Yes, I was.

Q. What award was that?

[22] A. The Sprint Values Excellence Award.

Q. Is that an individual award or team award?

A. It was for our team.

Q. How many people were on that team?

A. Approximately six.

Q. Do you recall who led that team?

A. Bob Baranek.

Appendix U-2

Q. What was your role on that team?

A. I was senior manager of projects.

Q. Do you know how many annual Sprint Values Excellence Awards were given to teams at Sprint?

A. No.

Q. Do you know how many were given in 1999?

A. No, I do not.

Q. What was your next role after program manager of Y2K?

A. Senior manager of — I believe it was strategic initiatives.

Q. When did you start in your role as a senior manager of strategic initiatives?

A. I believe it was like April of 2000.

Q. And was the change in roles from program manager Y2K to senior manager of strategic initiatives a promotion?

[23] A. No.

Q. Was it a lateral move?

A. Yes.

Appendix U-2

Q. What was your next role after senior manager of strategic initiatives?

A. My title stayed the same, but I did different duties.

Q. Did you have any roles other than senior manager of strategic initiatives between April of 2000 and the time of your separation of employment from Sprint?

A. I'm sorry, could you say that again?

Q. Did you have any roles other than senior manager of strategic initiatives from April of 2000 to the time of your separation of employment at Sprint? Let me ask it another way.

A. Please.

Q. Was the senior manager of strategic initiatives the last position you held at Sprint?

A. Yes.

Q. What location did you work from as a project manager of Y2K?

A. 9221 Ward Parkway.

Q. What location did you work from as a senior manager of strategic initiatives?

[24] A. The PCS building at College and Lowell.

Appendix U-2

Q. Did you ever work out on Sprint's campus?

A. No.

Q. What was your job grade as a senior manager of strategic initiatives?

A. Seventy-nine.

Q. And I believe you've previously mentioned that at some point in time your responsibilities as a senior manager of strategic initiatives changed; is that correct?

A. That's correct.

Q. What were your responsibilities as a senior manager of strategic initiatives when you started in April of 2000?

A. I'm sorry, I can't recall at this time.

Q. What were your responsibilities after they changed as a senior manager of strategic initiatives?

A. I went into project management.

Q. When did that happen?

A. Like at the end of 2000.

* * *

Appendix U-2

[38] * * *

Q. Who was your supervisor when you started working as senior manager of strategic initiatives?

A. I can't recall her name. I can see her, but I can't recall her name.

Q. Did your supervisor change at any time while you were a senior manager of strategic initiatives?

A. Yes.

Q. Who supervised your employment as a [39] senior manager of strategic initiatives while you were employed at Sprint?

A. The one woman that I can't recall her name who hired me into PCS. Sharon Vorhies and Chrystal Cone.

Q. What was the age of the woman whose name you can't recall who hired you into PCS?

A. I believe she was in her forties.

Q. And Sharon Vorhies, what was her age at the time she supervised your employment?

A. She was in her thirties.

Appendix U-2

Q. And Chrystal Cone, what was her age while she supervised your employment?

A. I believe she was in her forties.

Q. The woman who hired you into PCS, whose name you can't recall, who was her supervisor?

A. His name was Bob, but I cannot recall his last name.

Q. Who was Sharon Vorhies' supervisor when she supervised your employment at Sprint?

A. Ferrie Kizzire.

Q. F-E-R-R-I-E.

A. I don't know.

Q. Who was Chrystal Cone's supervisor at the time she supervised your employment?

[40] A. Allen Winters.

Q. Do you know who Ferrie Kizzire's supervisor was at the time that Sharon Vorhies supervised your employment?

A. No, I don't remember.

Appendix U-2

Q. Do you know who Allen Winters' supervisor was at the time Chrystal Cone supervised your employment?

A. I believe it was Tony Castanon.

Q. Do you know who Tony Castanon's supervisor was when Chrystal Cone supervised your employment?

A. I don't recall his name.

Q. How long did the woman whose name you don't remember, who hired you into PCS, how long did she supervise your employment?

A. Approximately a year.

Q. And how long did Sharon Vorhies supervise your employment at Sprint?

A. I'd say approximately six months.

Q. And how long did Chrystal Cone supervise your employment at Sprint?

A. Approximately four months.

Q. Was Chrystal Cone your supervisor at the time your employment was separated in November of [41] 2002?

A. Yes.

* * *

Appendix U-2

[49] * * *

Q. When were you notified of your separation of employment from Sprint?

A. November 2002.

Q. Do you remember the day?

A. I believe it was the 22nd.

Q. And who told you of your separation of employment from Sprint?

A. Chrystal Cone.

[50] Q. And what did Chrystal tell you at the time that she told you your employment was being separated on November 22nd, 2002?

A. That my job was eliminated.

Q. Did she tell you anything else?

A. She gave me a packet.

Q. Anything else?

A. No.

Q. Did she tell you why your employment was being separated from Sprint?

A. Because my job was eliminated.

Q. Any other reasons given?

A. No.

* * *

[109] * * *

Q. So you worked for Ellen Mendelsohn between 1991 and 1993; is that correct?

A. Yes.

Q. Did you ever work for Ellen Mendelsohn after 1993?

A. No, I don't believe so.

Q. Did you have occasions as part of your job responsibilities at Sprint after 1993 to interact with Ellen Mendelsohn?

A. As part of my job responsibility?

Q. Yes.

A. No.

Appendix U-2

Q. Did you ever live with Ellen Mendelsohn at any point in time?

A. No.

Q. There was a document in your personnel [110] records that includes Ellen Mendelsohn's address. I think it was listed as one of your own so that's the only reason I asked. I was just curious.

A. No.

Q. Do you know what Ellen Mendelsohn's performance feedback was in her last role at Sprint?

A. I know what she told me.

Q. What was that?

A. That it was unfavorable.

Q. Do you know who gave her that feedback?

A. I don't recall the gentleman's name.

Q. Do you know Ellen Mendelsohn's last job title at Sprint?

A. I don't recall the exact title, no.

Q. Do you know what her last job grade was at Sprint?

A. Yes.

Q. What was that?

A. Seventy-nine.

Q. Do you know what organization she worked in at Sprint?

A. I don't know what they called themselves.

Q. Okay. Business development and strategy group ring a bell?

[111] A. Yes.

Q. While you were employed as a senior manager of strategic initiatives, did you interact with the business development and strategy group?

A. No.

Q. Did you ever work with a gentleman by the name of Jim Fee while you were employed at Sprint?

A. Jim Fee?

Q. Yes.

A. No.

Appendix U-2

Q. Did you ever work with a gentleman by the name of Paul Reddick while you were employed by Sprint?

A. No, not that I can recall.

* * * *

APPENDIX U-3 — EXHIBIT C
EXCERPTS FROM DEPOSITION TRANSCRIPT
DATED APRIL 23, 2004
(SHARON MILLER)

[Commencing at Page 70]

* * *

Q. Did Noel supervise your employment after Cloene Davis retired?

[71] A. Yes, he did.

Q. Did you continue to perform your ordinary job duties after Cloene Davis retired?

A. Yes.

Q. And when did Noel Strong suggest that you should look for other work at Sprint?

A. As soon as I was aware that — there were a few days between the time that Cloene's leaving the company was announced and the announcement came out that told us who we reported to. I learned it through Noel that I was reporting to him and I set up an appointment to speak with him. It was within a few days after Cloene's leaving.

Q. Did you know what Noel Strong's age was at the time that you began reporting to him?

A. No, I don't know. I don't know his age.

Q. Did you know what Noel's position was?

A. Yes, it was director.

Appendix U-3

Q. So you went from reporting to a VP to a director after Cloene Davis retired; is that right?

A. That's correct.

* * *

[122] * * *

Q. Do you know what Ellen Mendelsohn's job title was while she was employed at Sprint?

A. No, I don't.

Q. Did you ever have any opportunity to interact with Ellen Mendelsohn while she was employed at Sprint?

A. No.

Q. Do you know what Ellen Mendelsohn's job grade was when she was — her employment with Sprint was separated?

A. No, I don't.

Q. Do you know what organization Ellen Mendelsohn worked in?

A. No.

Q. Do you know who she reported to?

A. No.

Q. Do you know which location she worked at?

A. No.

Q. Do you know what performance ratings [123] Ms. Mendelsohn was given?

A. No.

Q. Do you know how long Ms. Mendelsohn was at Sprint?

A. No.

Q. Do you know what Ms. Mendelsohn's compensation was?

A. No.

Q. Have you ever met Ellen Mendelsohn?

A. Not that I recall. Her name doesn't — her name kind of sounds familiar, but working in a large organization, it's hard to know whether you've ever had contact. I don't recall ever having met her.

Appendix U-3

Q. While you were employed at Sprint, did your job responsibility ever require you to interact with the BD&S organization at Sprint PCS?

A. No, I'm not.

Q. Business development and strategy, does that help refresh your recollection in any way?

A. I remember that — I didn't remember the acronym, but I do remember the business development and strategies. I don't believe I ever interacted with anyone in that organization.

* * * *

APPENDIX U-4 — EXHIBIT D
EXCERPTS FROM DEPOSITION TRANSCRIPT
DATED APRIL 19, 2004
(JOHN BOREL)

(Commencing at Page 10) * * *

Q. What office did you work from while you were employed by Sprint?

A. I worked in the STIC Lab. It was — when I first joined it was called the voice activated [11] dialing team, and we basically brought in new voice-activated software, tested it before deploying it into the field.

Q. STIC Lab for our court reporter's sake is S-T-I-C; is that correct?

A. S-T-I-C.

Q. That's an acronym?

A. Sprint Technology Integration Center.

Q. You said you brought in new voice software for Sprint; is that right?

A. Well, we worked with IBM. Most of our — most of the software was from IBM.

Q. Were those the same responsibilities that you had at the time your employment with Sprint was terminated?

A. Yes.

Appendix U-4

Q. You implied that the name had changed from voice activated drafting team. Did it change at any time?

A. Voice activated dialing team. It changed about the time I got laid off. I don't have the — I don't remember the exact name, but it was very similar, did the same thing.

Q. Your responsibilities didn't change, just the name of the team changed; is that right?

[12] A. Exactly.

Q. What was your title when you were first employed by Sprint?

A. I was Project Manager 3.

Q. While you were employed at Sprint, did you have any job titles other than Project Manager 3?

A. No.

Q. Do you recall what your job grade was as a Project Manager 3?

A. I was a 76.

Q. Did you understand what the significance of being a job grade 76 level employee was at Sprint?

A. Yes, I did.

Q. What was that?

A. Well, in the project management area, there were certain things that I was supposed to be able to do at that level and as you go higher, those duties increase in complexity, that kind of thing.

Q. Can you describe the functions of your role as a Project Manager 3 at Sprint?

A. Yes. I basically was in charge of monitoring our software testing within our team [13] and whenever we would identify software problems, I was in charge of holding weekly meetings or sometimes even daily to try and resolve those so we could get fixes made to the software in time to deploy to the field as quick as possible.

Q. How many project management — strike that. How many Project Manager 3 positions were there on the voice activated dialing team when you started?

A. Just one, mine.

Q. Who else was on the voice activated dialing team when you started in November 2000?

A. Well, there were seven engineers and my manager, Janet Mathus.

Appendix U-4

Q. Were you ever asked to perform the functions of an engineer?

A. No.

Q. Were you qualified to do the function of an engineer?

A. I was not.

Q. Was the voice activated dialing team part of a bigger organization at Sprint?

A. Yes, it was.

Q. What was that called?

A. It was a director at — I forgot the [14] name. It's a certification directorate. I forget the exact name, but that was part of it.

Q. What do you mean by certification directorate?

A. Well, we certified software before it went to the field to support our customers and that's what our directorate did. We worked in four different teams to bring in new software to improve the Sprint system, and it was certified and fielded to our customers.

Appendix U-4

Q. So we're on the same page if I use the term "certification directorate team," you understand that means a broader group that the voice activated dialing team was a part of?

A. Yes.

* * *

[17] Q. Who was your supervisor at the time your employment began in November of 2000?

A. Janet Mathus.

Q. Do you know if Janet is the one who decided to offer you employment at Sprint?

A. Yes, she did.

Q. Who did Janet report to — strike that. Did your supervisor ever change at any time while you were employed at Sprint?

A. No.

[18] Q. Who did Janet report to in November of 2000? When I say "Janet," I mean Janet Mathus.

A. You know, we were in a bit of transition there when I first came on board. I don't think they had a director at all and I don't know who was actually — I don't know who she was reporting to to tell you the truth. I think she was even

acting at some point in time as director, I don't know. They were just forming the group and, you know, it was very new and I really didn't know a whole lot about, you know, that process of transition. I just joined the team, so I had never met a director at that time.

Q. Who was Janet Mathus' supervisor at the time your employment was terminated from Sprint?

A. Mohammad Hussain.

Q. Do you recall Janet Mathus reporting to anyone other than Mohammad Hussain while you were employed at Sprint?

A. Unless there was someone early on it that process of transition, he's the one that came in and took over.

Q. Okay. Who did Mohammad Hussain report to at the time of your termination of employment?

A. Mihwa. I forget her last name. She was [19] a senior vice president of the STIC Lab.

Q. Do you know who Mihwa reported to at the time of your termination of employment?

A. I think Dennis Huber, you know, there could be layers between those two. Dennis Huber was senior vice president in charge of PCS.

Q. He was in charge of all of the PCS as far as you know?

A. He was a senior vice president within PCS. He wasn't the head guy, but he was pretty high up.

Q. Do you know who Dennis Huber would have reported to at the time of your termination of employment?

A. You know, I know I've heard the name, I don't — I really don't know.

Q. Other than Mihwa, do you know if Mohammad Hussain had reported to anyone else while you were employed at Sprint?

A. I don't think so.

Q. Prior to your termination of employment, had you applied for any other positions at Sprint?

A. Prior to my termination?

Q. Let me rephrase that. Prior to your termination of employment, had you applied for any [20] other position at Sprint between the time of your — strike that. I'm struggling, I apologize. While you were employed at Sprint, did you apply for any other role?

A. Only during my transition process after I was laid off.

Appendix U-4

Q. While you were employed by Sprint, did anybody ever tell you you could not apply for employment for other positions at Sprint?

A. I wasn't allowed to for a while, but they changed their mind.

Q. When were you not allowed to apply for other positions at Sprint?

A. Well, a week prior to me being laid off, I went to talk to Jay Cole who was the manager within our directorate who had a vacant PM position. He was wanting me to take that job and work with him and as — after I got laid off, I put in for that position and he had told me that I was not allowed to put in for this because I had been banned and that I had an adverse rating in my file.

Q. Do you remember the day that you spoke to Jay Cole?

A. It was about a week before I got laid [21] off. I got laid off on the 26th of February, 2003, so a week prior to that I guess, that time frame.

Q. Somewhere around February 19th of '03; is that correct?

A. I don't remember that exact date, but it was a weekday, it was not a weekend. I don't remember the date.

* * *

Appendix U-4

[22] * * *

Q. Was anybody else with you when you spoke with Jay Cole about a vacant position?

A. No. He and I sat down, we went to a conference room and we talked about the position. He told me he thought I would be a very good fit for the job and that he wanted me on his team. I said, well, I would sure like to make the transition and he said he would talk to Mohammad Hussain about it.

Q. Did you approach your Mr. Cole about the position or did he approach you?

A. I think I approached him and then we set up a time to have me come in and talk to him about it. Not as a formal interview, but just to discuss the position and at that time he wanted me [23] to apply for the job.

Q. Did you apply for the job?

A. Yes, I did.

Q. When was that?

A. That was after I was laid off. I finally got through HR a copy of the JIR, they call it job interest, job information request or interest request, something like that. They sent it to me at my home. I filled it out in an hour or two, sent it right back in order to get my name in for that job.

Appendix U-4

Q. Did you fill that form out completely?

A. I did.

Q. Did you fill it out truthfully?

A. Yes, I did.

Q. Why did you approach Mr. Cole about this open project manager 4 position?

A. Well, I tell you what, I thought it would be a good position for me to get into. I knew Martina Howell, she had enjoyed it a lot. We were actually going through a big transition and that particular position was going to be the focal point dealing with the contract folks on different projects. So it would have changed my job from monitoring software testing to dealing with [24] contracts. And as I understood it, the major programs were coming into the STIC Lab interdirectory and I would really be at a different level, hopefully it would be a promotion in it for me.

Q. Were you dissatisfied working for Janet Mathus?

A. I can't say I was dissatisfied. I enjoyed my time on the team, however it was getting a little rougher to work for Janet.

Q. Why was it getting rougher to work for Janet?

A. Well, to tell you the truth, Janet was — I think she was a little intimidated by me. I think she was trying to at

times make me look bad in front of the rest of the team, and I think she felt threatened by me because I had experience and I had been a manager for 30 years in the Army and I can't tell you all the details that made her feel like that, but she definitely held things back from Mohammad about me such as my completing a master certificate in project management. I completed that before I got terminated and she never told the director about it for me to be recognized.

* * *

[99] * * *

Q. Do you know what Ellen Mendelsohn's job title was at Sprint?

A. No, I don't.

Q. Do you know what her job grade was?

A. No.

Q. Do you know which organization she worked in?

A. No.

Q. Do you know who she reported to?

A. No.

Q. Do you know which location she worked at?

A. No.

Appendix U-4

Q. Do you know what performance feedback she received?

A. No.

Q. Do you know how long Ellen Mendelsohn was at Sprint?

[100] A. I don't know anything about Ellen Mendelsohn other than she was discriminated against.

Q. How do you know that?

A. At least she thinks she was.

Q. So your understanding is that she was discriminated against is based upon her belief?

A. Based on what was done to me.

Q. So you think because you think you were discriminated against because of your age Ellen was as well?

A. Well, she obvious thinks that. I don't know her personally so I can't say.

* * * *

APPENDIX U-5 — EXHIBIT E
EXCERPTS FROM DEPOSITION TRANSCRIPT
DATED APRIL 24, 2004
(JOHN E. HOOPES, JR.)

(Commencing at Page 7) * * *

Q. What was your last day of work at Sprint?

A. February — I think it's February 8th, 2002.

Q. At any time between 1986 and February of 2002, did you work anywhere other than Sprint?

A. No.

Q. You were continuously employed by Sprint [8] from 1986 until February of 2002; is that correct?

A. Yes, sir. You know, I left out in between working as a manager of technical training and manager of CTI, I was senior technical consultant for the — anyway, the national accounts out of Philadelphia, Pennsylvania.

Q. Was that a sales position?

A. That was — both the technical consultant and the senior technical consultant were sales support; in other words, I was paid a salary, but not commission.

Q. And you moved to Pennsylvania. What year was that?

A. I'm sorry, I really don't remember exactly, you know, just don't remember.

Appendix U-5

Q. Did you move to Pennsylvania because your wife was working there?

A. Yes, sir. Yes, sir.

Q. So you actively sought employment with Sprint in Pennsylvania?

A. Yes.

Q. What was your position after project manager for CTI?

A. Senior programmer 5.

Q. Was that a software engineer position?

[9] A. Yeah, software engineer 5.

Q. And did you have any positions at Sprint other than — strike that. What was your next position at Sprint after this?

A. That was my final position.

Q. I didn't ask that very well. I appreciate you anticipating my question. All right. You're changing jobs from a technical consultant to a technical trainer. Was that a promotion?

A. Yes, yes.

Q. And the change in jobs from a technical trainer to a senior technical consultant for national accounts, was that a promotion?

A. Yes.

Q. And when your job changed from senior technical consultant of national accounts to a manager of technical training, was that a promotion?

A. I think, yeah, that was a promotion.

Q. Okay. And change in jobs from manager of technical training to project manager of CTI, was that a promotion?

A. Yes.

Q. Then when your job changed from project [10] manager of CTI to senior — strike that. To software engineer 5, was that a promotion?

A. No.

Q. Was that a demotion?

A. No. That was a lateral. I believe that was a lateral.

Q. Were you ever demoted while you were employed at Sprint?

A. Yes.

Appendix U-5

Q. When were you demoted when you were employed at Sprint?

A. When I was a manager of technical training, I was demoted back to technical trainer.

Q. When was that?

A. That was just before we went to Philadelphia, Pennsylvania, about a year before we went to Pennsylvania.

Q. Do you know what your age was at the time?

A. Forty-three, 44, something like that.

Q. Did you believe the demotion back to a technical trainer position was because of your age?

A. No.

Q. Why was your position changed from [11] manager of technical training to technical trainer?

A. Because my vice president said to.

Q. Other than the position you held as a senior technical consultant for national accounts in Pennsylvania, were all of your other positions at Sprint in the Kansas City area?

A. Yes.

Appendix U-5

Q. What was your job grade at the time of your separation of employment from Sprint?

A. I believe it was 76.

* * *

[17] * * *

Q. Terri Reynolds was your manager at the time your employment was separated by Sprint?

A. Uh-huh.

Q. Is that a yes?

A. Yes. I'm sorry, yes, it was a yes.

* * *

[18] * * *

Q. Who did Skip report to when — I guess that's a man; right?

[19] A. Yes.

Q. Who did Skip report to when Skip managed your performance?

A. The same director that Terri reported to.

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Q. Who was that?

A. I'm sorry, I'm terrible with names, I really can't remember his name.

Q. What was the director's age when you reported up to the director through Skip and Terri?

A. I remember that he was getting ready to retire. His comment when we were — when I was laid off anyway was that he was getting ready to retire.

Q. And do you recall who this director reported to while Terri and Skip supervised your employment?

A. There were two vice presidents and I don't remember any of this. It's terrible, but I don't remember names. One was a male and he was replaced by a female.

Q. Was the woman Carol Gast?

A. I believe so. I believe so. That sounds very familiar, yes.

Q. Do you know what Carol's age was at the [20] time that Skip and Terri supervised your employment?

A. It's kind of hard to estimate a woman's age, so somewhere between 35 and 45.

* * *

Appendix U-5

[25] * * *

Q. When were you told of your separation of employment from Sprint?

A. February 8th.

Q. That was 2002?

A. 2002.

Q. Did you work at any time for Sprint after February 8th, 2002?

A. No.

* * *

[26] * * *

Q. Who told you your employment with Sprint was being separated?

A. Informally I was told by my manager on the way to my director's office and formally I was told by my director.

Q. Your manager at the time was?

A. Terri Reynolds.

Appendix U-5

Q. Who was your director?

A. I don't remember, I'm sorry. I apologize, I just don't remember at this time.

Q. Did Terri Reynolds tell you why your employment with Sprint was being separated?

A. No.

Q. Did your director tell you why your employment with Sprint was being separated?

A. From what I recall, I believe he said they were downsizing.

Q. Did your director tell you why others were being retained by Sprint?

A. No.

* * *

[65] * * *

Q. Mr. Hoopes, do you know Ellen Mendelsohn?

A. Only through my wife.

Q. Have you ever met Ellen?

A. Yes.

Q. When was that?

A. Several different occasions, usually social functions that were for my wife's work at Sprint. Occasionally when I visited my wife's job, I would meet Ellen.

Q. This was while your wife worked for Mrs. Mendelsohn?

A. Well, even when she wasn't working directly for her, they were —

[66] Q. Have you spoken with Mrs. Mendelsohn regarding her claims against Sprint?

A. No.

Q. Do you know what Ellen Mendelsohn's job title was at the time her employment was separated?

A. No, I do not.

Q. Do you know what her job grade was at that time?

A. No.

Q. Do you know what organization she worked in at the time of her separation?

A. To be honest with you, no. Not to be honest with you, but honestly, no, I don't know what she —

Appendix U-5

Q. Do you know who Mrs. Mendelsohn reported to at the time of her separation of employment?

A. No, I have no knowledge of that.

Q. During your employment at Sprint, did you have an opportunity to work with Sprint PCS business development and strategy group?

A. No, not that I'm aware of.

Q. Did you ever have a chance to observe Mrs. Mendelsohn's performance as an employee of Sprint?

[67] A. No.

Q. Never your responsibility to rate her performance?

A. No.

Q. Do you know what performance feedback Mrs. Mendelsohn received while she was employed at Sprint?

A. No, I have no idea.

Q. Do you know how Mrs. Mendelsohn was compensated?

A. No, no idea.

* * * *

APPENDIX V — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS FILED JANUARY 13, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CIVIL NO.
03-2429-KHV

ELLEN J. MENDELSOHN

v.

SPRINT/UNITED MANAGEMENT COMPANY

JUDGMENT IN A CIVIL CASE

(X) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiff to take nothing and the action is dismissed on the merits.

Dated: January 13, 2005

RALPH L. DeLOACH, CLERK

s/ Linda South
Linda South, Deputy Clerk

APPENDIX W — PLAINTIFF'S MOTION FOR NEW TRIAL AND SUGGESTIONS IN SUPPORT OF MOTION DATED JANUARY 28, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff Ellen Mendelsohn, through counsel, hereby files her Motion for New Trial, stating as grounds the following:

1. The Verdict was rendered January 13, 2005. Judgment was entered on January 13, 2005.

2. This Motion is timely, in that Rule 59 requires that a motion for new trial be filed no later than ten days after the entry of Judgment. Under Rule 6, "When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Rule 6 defines "legal holiday" as including the birthday of Martin Luther King.

3. Thus, because the date of the entry of Judgment is not counted, and because intermediate Saturdays, Sundays and Martin Luther King's birthday holiday shall not be counted, this Motion is timely if it is filed on or before Friday, January 28, 2005.

4. Plaintiff's ground for her Motion for New Trial is the prejudicial exclusion of evidence. The particular grounds are that the Court erred in precluding plaintiff, in an Order in Limine entered before any evidence was proffered during trial, from putting on evidence concerning other satisfactorily-performing, long-service older employees terminated in the same PCS reduction-in-force, in the same or similar time frame, as plaintiff. The ruling was overly restrictive, by requiring that employees could not testify unless supervised by Paul Reddick. This exclusion is far too narrow under Tenth Circuit law, and allowed the defendant to prejudicially argue that there was no "pattern" of age discrimination by Reddick, because plaintiff was, according to defendant, the only person over 40 terminated "by Reddick." A true (and totally different) picture would have been presented if plaintiff had been allowed to present the evidence proffered by plaintiff in her "Offer of Proof" (copy attached), filed per the direction of the Court's Clerk, before the close of plaintiff's case-in-chief.

5. Legal authority was presented to the Court in opposition to defendant's Motion in Limine, and is set forth in Suggestions in Support, which accompany this Motion.

Appendix W

Respectfully submitted,

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Appendix W

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL

Defendant, in its Motion in Limine briefing misstated Tenth Circuit law, and in turn misled the Court: "Because the law is clear that discrimination against other employees *may be relevant only if it involves the same decision maker involved in plaintiff's termination and same levels of responsibility as plaintiff*, Sprint's Motion in Limine regarding broad allegations of age discrimination should be granted."[1] (italics added). The law is *not* as defendant posits, as plaintiff pointed out in opposition to the Motion in Limine.

And yet, the Court ruled in its Order in Limine that plaintiff could *not* present evidence through other RIF'd employees, unless their decisionmaker was Paul Reddick.

1. *See* Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion in Limine, page 3.

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The Court remained solid in its decision, so to preserve the record, plaintiff made an Offer of Proof regarding similarly-situated employees terminated as part of the same Sprint reduction-in-force that also resulted in Plaintiff Ellen Mendelsohn's termination. Plaintiff has attached the Offer of Proof to the Motion so as not to unduly lengthen these Suggestions.

The Court's ruling unfortunately prejudiced plaintiff by giving defendant an unfair advantage at trial. For example, the Court will recall that by virtue of plaintiff being prevented from presenting evidence that other older employees who, like plaintiff, also had been rated satisfactorily for a number of years yet also were terminated, under pretextual circumstances, defendant was allowed to argue to the jury (1) that there was no "pattern" of age discrimination by Paul Reddick; and (2) that the only employee over the age of 40 terminated as a result of decision making "by Paul Reddick" was Ellen Mendelsohn. Defendant thus was allowed to mischaracterize Ellen Mendelsohn as a solitary, isolated "poor performer" who just got caught up in the financial crunch.

The Excluded Evidence

Plaintiff Ellen Mendelsohn was falsely seen as an isolated case. What a different picture if plaintiff had been able to present that an employee such as Bonnie Hoopes: rated predominantly as an "Exceeds Expectations" (a "2") in the years just before the roll-out of the new Alpha LINK, Bonnie plummeted to a "4" and the lowest possible Alpha level ("S"). Bonnie Hoopes was told her PCS job was

"eliminated" (the same day as plaintiff), yet she learned (just like plaintiff) that three different individuals, including two in their early 30s took over her job. Bonnie Hoopes (like Ellen Mendelsohn) had "the most seniority" in her group. Her supervisor "told me I was too old for the job." Bonnie Hoopes' supervisor also gave Hoopes an e-mail in February of 2002 (around the time of the roll-out of the "Alpha" rating system), stating a management preference for employees "blessed with lots of runway ahead of them."

Yvonne Wood and Sharon Miller also were in the PCS Organizations, in an IT area headed up by Chief Information Officer (CIO) Jerry Batt. Batt was a peer of Bill Blessing, the Vice President of Business Development & Strategy (BDS) who testified at trial. Ms. Miller and Ms. Wood also were terminated as part of a Sprint PCS RIF in November, 2002 and January, 2003. Both were solid performers, replaced by younger, less-experienced employees. Both heard age-derogatory comments from supervisors. John Hoopes is the husband of Bonnie Hoopes. He also was terminated by Sprint as part of a reduction-in-force. Part of his testimony, if allowed, would have included his 16-year record of high performance, the lack of any performance reason for his termination, and the fact that despite going through Right Management and applying for as many as 15 to 20 Sprint jobs in a given day, he was never offered another position, despite his qualifications.

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The Pretrial Exclusion Prejudiced Plaintiff's Case

As pointed out in previous briefing, *Spulak v. K-Mart Corporation*, 894 F.2d 1150 (10th Cir. 1990) allows evidence from other employees about the circumstances under which they left their employment even though they worked in a different location and under *different* supervisors. In *Spulak*, two employees who testified "worked in the same state as Spulak and were fired within a very short time after Spulak left K-Mart." *Id.* at 1156-57, n. 2. *Spulak* involves a corporate restructuring (or reduction-in-force), and *Spulak* declares the general rule for admissibility rather categorically:

> As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent. *See, e.g. Hunter v. Allis Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986) . . . ; *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97 (7th Cir. 1985) (ADEA); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983) . . . ; *Morris v. Washington Metropolitan Area Transit*, 702 F.2d 1037, 1045-46 (D.C. Cir. 1983) . . . ; *Harpring v. Continental Oil Company*, 628 F.2d 406, 409 (5th Cir. 1980)(ADEA).

The cases from sister circuits cited by the Tenth Circuit in *Spulak* do not stand for defendant's narrow proposition that a plaintiff *must* show action taken by the same supervisor, against employees with the "same level of responsibility as plaintiff." It is the corporation, not the supervisor, whose practices and conduct is at issue.

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Plaintiff also cited *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991): Also an ADEA case . . . also involving a RIF . . . also *not* requiring the showing of "same supervisor" that Sprint represents. In *Bingman*, defendant laid off 350 field workers during 1985. Three men would be laid off in the support operation — two from the "mechanical side" of the warehouse where plaintiff worked, and one from the "sheet metal side." Plaintiff and Melvin Mitchell, a truck driver, were terminated on the "mechanical side," and Oswat, a fork life operator, was terminated from the "sheet metal side." Similar to Ellen Mendelsohn's case, plaintiff's job was taken over by younger men with less seniority, but two 60-year-old employees *were kept on* after plaintiff was terminated.

Nonetheless, at trial, the Court allowed plaintiff to show that one year after plaintiff was terminated, an employee named Lopez, age 60, who had remained after the plaintiff was terminated, "**lost his job at the next reduction-in-force, which occurred about one year after Bingman lost his job.**" (bold added) *Id.* at 556. This evidence was received over defendant's objection that "circumstances were different at that later time." 937 F.2d at 556. Importantly, the trial court ruled "that the Lopez termination was close enough in time to be evidence of defendant's practice in terminating older employees . . . . There was also evidence that another employee, Welch, age 60, was also terminated in a reduction-in-force." *Id.* at 556. Citing *Spulak v. K-Mart*, the Tenth Circuit in *Bingham* ruled (at 556-57):

> Evidence concerning the makeup of the employment force and events which occurred after

> plaintiff's termination were entirely relevant to the question of whether or not age was one of the determinative reasons for plaintiff's termination; and, as the trial court found, evidence not too remote in time that defendant terminated others in the 60-year-old age group would be entirely relevant to the question of defendant's policies and practices.

Evidence endorsed *and* approved as admissible in *Bingman* related to employees terminated in a reduction-in-force up to *one year after* the plaintiff. There is no mention that such evidence "must" involve the same decision maker. The Tenth Circuit in *Bingham* also rejected defendant's arguments that it was surprised and prejudiced:

> Defendant had an opportunity to present evidence and explain the later terminations and did present testimony that Welch, an assistant mechanic, did not have the same qualifications as Cole, the head mechanic, who was retained.

Id. at 557. Approving the admission of the evidence, the Court observes, "The jury was entitled to judge the credibility of the witnesses, to resolve conflicts of evidence in plaintiff's favor, and to find that plaintiff's age was a determinative factor in defendant's decision to terminate his employment." *Id.* at 557.

Similarly, *James v. Sears Roebuck & Company, Inc.*, 21 F.3d 989 (10th Cir. 1994) supports admission of testimony from similarly-treated employees — even if working *outside*

Ms. Mendelsohn's BDS organization. There, the Tenth Circuit affirmed jury verdicts for six ADEA plaintiffs forced out during a purported "corporate efficiency move," described by the Tenth Circuit as "**a corporate attempt to reduce payroll costs by replacing experienced and well paid workers 40 years of age or older with lesser experience and lower paid younger workers.**" (bold added) *Id.* at 991. The quoted portion aptly describes a prong of the case Ellen Mendelsohn was trying to present. The evidence received in that case came from plaintiffs in different organizations: the Ogden, Utah Service Center; and a retail store. Granted, the plaintiffs in *James* had their claims tried in the same trial before the same jury. But a close reading of *James* will show that the evidence of the defendant's similar treatment of all of those similarly-situated older employees was analyzed as being relevant and probative of each of their age discrimination claims.

The cited cases show that "pattern and practice" allegations need not be at issue: *Spulak* is an individual case. So is *Kingman*. So also *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996); *aff'd after remand*, 210 F.3d 1237 (10th Cir. 2000). In *Greene*, The Tenth Circuit cites favorably the law from other Circuits that has declared over the years that evidence from other employees should be admitted in employment lawsuits. Eighth Circuit law is particularly instructive, particularly on the dangers of blanket *pretrial* evidentiary exclusions.

Evidence tending to show a climate of age bias "is indeed relevant to proving a particular instance of discrimination" in *all* discrimination cases, for the very reason that "plaintiffs

face the difficult task of persuading the fact finder to disbelieve an employer's account of its own motives." *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988):

> Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices — evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Id. at 1103. *See also Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155-56 (8th Cir. 1990) (citing *Estes*, reversing a defense verdict based on the very same reasoning); *Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991) (reversing a defense verdict in an ADEA case and adopting the same reasoning as *Estes* and *Hawkins*).

In those three seminal cases in the Eighth Circuit, defense verdicts were reversed because evidence of the employers' "past discriminatory policy and practice" was wrongly excluded in pretrial rulings. Each of those cases holds that such evidence should "normally be freely admitted at trial." This oft-cited law has been repeatedly reinforced in the Eighth Circuit — particularly on the danger of blanket evidentiary exclusions. *See Jenson v. Eveleth Taconite*, 130 F.3d 1287, 1298 (8th Cir. 1997): "This Court has cautioned that blanket evidentiary exclusions can be especially

damaging in employment discrimination cases." (citing *Estes* and *Hawkins*); *White v. Honeywell, Inc.*, 141 F.3d 1270, 1276 (8th Cir. 1998): "We have long held that evidence of prior acts of discrimination is relevant to an employer's motive even where it is not extensive enough to establish discriminatory animus by itself." (citing *Estes* and reversing a defense verdict).

In *Parrish v. Immanuel Medical Center*, 92 F.3d 727, 733 (8th Cir. 1996), the Court cites *Hawkins* in approving testimony by another employee "that she had been told to retire." Again, "Where the plaintiff faces the difficult task of establishing an employer's motive, such evidence "provides valuable circumstantial proof of an atmosphere of age bias and an employer's unlawful intent." *Id.*

The Court's *in limine* ruling gave an unfair advantage that tipped the scales for the defendant. The jury properly learned that PCS had the RIF. That's fine, it was part and parcel of the circumstances. The jury heard that Ellen Mendelsohn had years of positive ratings, only to be victimized by a "secret" forced ranking that took place in executive succession planning exercises before the RIF. The jury would have heard a *very similar* story from Bonnie Hoopes. As mentioned, Ms. Hoopes' ratings, which had been predominantly "2s" and "3s" until 2001, inexplicably plummeted in the "shadow" ratings to an "S." Bonnie Hoopes had recently been an award winner, yet was terminated and replaced by younger employees because her supervisor said she was "too old." The "Shadow" link of "S" would have caused the jury to "raise an eyebrow" at the remarkable "coincidences" befalling these two older, long-service employees.

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The particularly on point authority for the particular type of evidence plaintiff sought to offer is *Phillip v. ANR Freight Systems, Inc.*, 145 F.2d 1054. In *Phillips*, plaintiff's counsel made an Offer of Proof "[i]ncluding evidence of other age discrimination lawsuits filed against ANR." *Id.* at 1056. Judge Whipple, of the Western District of Missouri, found plaintiff had failed to show the cases were "sufficiently similar to his own case," and thus were "irrelevant and unduly prejudicial." The exact same argument was made by defendant Sprint in its Motion in Limine. After discussing both *Estes* and *Hawkins*, the Eighth Circuit pointedly rejected the discretionary rationales for exclusion:

> In light of our recent decision in *Hawkins v. Hennepin Technical Center*, ... **We must disagree with the district court's exclusion of this important evidence**. (boldface added).

Phillip cites *Estes* and *Hawkins* for the legal rule that, "An employer's background of discrimination is indeed relevant to proving a particular instance of discrimination." *Id.* at 1056. On retrial, the plaintiff introduced a chart summarizing other complaints of age discrimination. *See Phillip II*, 61 F.3d 669 (8th Cir. 1995).

Ryther v. KARE 11, 108 F.3d 832 (8th Cir. *en banc* 1997) is an important *en banc* decision by the Eighth Circuit, which affirms an age discrimination verdict which included the same type of evidence Plaintiff Ellen Mendelsohn sought to introduce herein. In *Ryther*, a single plaintiff case, the district court allowed evidence "that defendants forced other older employees to choose between demotions or early retirement."

Id. at 843, n. 11. The Court continued, in words absolutely consistent with the evidence Ellen Mendelsohn intended to offer: "Several of the older employees were suddenly given poor performance reviews after receiving years of superior ratings." *Id.*[2] Defendants in Ryther unsuccessfully made the same argument against admission that Sprint successfully made in persuading this Court to preclude this important evidence. For reasons endorsed on appeal in *Ryther*, the District Judge held the "other employee" evidence was sufficiently similar to aid the jury (at 843, n. 11):

> **Defendants contend that evidence concerning the older employees was not relevant because they were not on air talent and, therefore, were not similarly situated to Ryther. Although the situation of the older employees and Ryther differ in some respects, the Court finds there were enough similarities to render the evidence relevant and admissible. The Court also concludes that a jury could reasonably find that defendants intentionally built poor performance cases against older employees, including Ryther.** (bold added).

The Court in *Ryther* also quoted a case cited favorably by the Tenth Circuit within the *Greene v. Safeway* decision. That case is *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990), where the Eighth Circuit affirmed an ADEA plaintiff's judgment in a case involving evidence received from employees over 40 leaving the Circulation Department

---

2. This is the exact same pattern that happened with Ellen Mendelsohn, Bonnie Hoopes, John Hoopes, etc.

and being replaced by younger employees. The Tenth Circuit in *Greene* observed that the Eighth Circuit had referred to the evidence elicited in *Morgan* as providing "one thread of evidence" that led to upholding the age discrimination award. *Greene v. Safeway* quotes *Morgan* as follows:

> This fact is certainly no conclusive evidence of age discrimination in itself, but it is surely the kind of fact which would cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome.

Greene, at 98 F.3d 561, quoting *Morgan*, 897 F.2d at 951. The *Ryther* case also quotes *Morgan* as "one thread of evidence," which in itself is not sufficient to prove age discrimination, but taken in the context of the whole case produced evidence of pretext in the context of evidentiary "indications of age-based animus in Ryther's work environment. . . ." *Id.* at 844. The excluded evidence here similarly provided further "threads" that could have made the difference by showing "age based animus" in Ellen Mendelsohn's work environment.

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CONCLUSION

The evidence which plaintiff sought to adduce may have caused the scales of evidence to "preponderate" in her favor. The jury deliberated for a long time, and commented that this was a close case. Nonetheless, the fact that the Court excluded the evidence *in limine* suggests this is a rare case where retrial is necessary. As eloquently stated by the late Judge Richard Arnold in *Estes*:

> A trial court's exclusion of evidence under Fed. R. Evid. 403 is entitled to substantial deference on review. . . . But the Court's exercise of its discretion must not unfairly prevent a party from proving [her] case. In this case, we examine the consequences of the trial court's exclusions with particular care, since the court's determinations of probative value and prejudice were made before trial began, rather than during the development of the plaintiff s case before the jury. . . .
>
> The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact finder to disbelieve an employer's account of its own motives.

Id. at 1102-03. Plaintiff Mendelsohn again borrows the Eighth Circuit's concluding words to conclude here: "The jury should have been allowed to consider [Mendelsohn's] work force evidence and sort out the parties' conflicting explanations of its significance." For the reasons stated herein, plaintiff respectfully requests a new trial.

Appendix W

Respectfully submitted,

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APPENDIX X — DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL DATED FEBRUARY 9, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-CV-02429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

I. Introduction

Plaintiff argues that this Court erred when it excluded evidence of alleged discrimination against individuals other than Plaintiff, which allegedly occurred in organizations within Sprint in which Plaintiff was not employed, and which was allegedly committed by people who had no connection to Plaintiff. Plaintiff is wrong. The issue in this case was whether or not Paul Reddick's decision to terminate Plaintiff's employment was motivated by age discrimination. The Tenth Circuit repeatedly has recognized that testimony regarding other acts of discrimination is relevant only if the other acts involve the same decisionmaker whose motivation is at issue in the plaintiff's case.

Accordingly, this Court correctly excluded testimony regarding alleged discrimination by Sprint employees other than Paul Reddick. The few Tenth Circuit cases cited by Plaintiff do not stand for the proposition for which they are cited. Moreover, apparently dissatisfied with the clear law of this Circuit, Plaintiff inexplicably relies mostly on cases from the Eighth Circuit. In fact, Plaintiff's argument would fare no better under Eighth Circuit law than it does under Tenth Circuit law.

II. Argument

A. Standards Governing Motion for New Trial

New trial motions are not regarded with favor and are granted only with great caution. *Law v. National Collegiate Athletic Ass'n*, 85 F.R.D. 324, 326 (D. Kan. 1999). In reviewing a motion for new trial, the court must view the evidence in the light most favorable to the prevailing party. *Id.* Evidentiary rulings are committed the "very broad discretion" of the trial court. *Leidel v. Ameripride Services, Inc.*, 291 F. Supp.2d 1241, 1245 (D. Kan. 2003) (quoting *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999)). An evidentiary ruling is an abuse of discretion only if based on "'an erroneous conclusion of law, a clearly erroneous finding of fact, or a manifest error in judgment.'" *Id.*

Moreover, the party seeking to set aside a jury verdict must do more than demonstrate an abuse of discretion. *Leidel*, 291 F. Supp.2d at 1245. The movant must demonstrate trial error which constitutes prejudicial error. *Rahn v. Junction*

City Foundry, Inc., 161 F. Supp.2d 1219, 1227 (D. Kan. 2001) (citing *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983)). "The Court should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* (quoting *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 553 (1984)). No error in the exclusion of evidence can be grounds for granting a new trial unless the error affects the substantial rights of the parties. *Wirtz v. Kansas Farm Bureau Services, Inc.*, 311 F. Supp.2d 1197, 1226 (D. Kan. 2004); Fed. R. Civ. P. 61.

B. Acts of Discrimination Unrelated To The Decisionmaker Are Inadmissible

The Court's decision to exclude the proffered evidence in this case was not error at all, much less prejudicial error.

The issue in this case was whether Paul Reddick made his decision to terminate Plaintiff because of her age. Only evidence relevant to that issue could be admissible. Fed. R. Evid. 402. Accordingly, the Court correctly excluded the proffered evidence because that evidence, unrelated to Mr. Reddick's alleged age-discriminatory motive, could not be relevant to the issue being tried.[1]

The Tenth Circuit has recognized this principle repeatedly. In *Schneider v. City and County of Denver*, No. 01-119[illegible], 2002 WL 1938583 (10th Cir. Aug. 22, 2002),

1. Defendant's Motion in Limine and supporting memorandum (Docket Doc. #s 78 and 79) also set forth that the proffered evidence would have been properly excludable under Fed. R. Evid. 403.

the Court held that, in order to introduce evidence of other discriminatory acts, ". . . the plaintiff must show the circumstances involving the other employees are such that their statements can 'logically or reasonably be tied to the decision to terminate plaintiff.'" (quoting *Curtis v. Oklahoma City Public Schools Bd. of Education*, 147 F.3d 1200, 1217 (10th Cir. 1998)). The *Schneider* Court also cited with approval the opinion in *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). The *Schrand* Court reversed a plaintiff's jury verdict, finding that the trial court's admission of other employees' testimony that they had been discriminated against by defendant was erroneous because the person who made the decision to terminate Mr. Schrand was not involved in the decisions to terminate the other employees. 851 F.2d at 156.

The principle that other alleged acts of discrimination can be relevant only if committed by the same decisionmaker at issue in the litigation is particularly demonstrated by the Tenth Circuit's decision in *Simms v. State of Oklahoma*, 165 F.3d 1321 (10th Cir. 1999), *cert. denied*, 528 U.S. 815 (1999). In that case, the Tenth Circuit was faced with evidence that the same plaintiff had earlier been discriminated against by different decisionmakers employed by defendant. Despite the fact that the prior litigated discrimination involved the same plaintiff and defendant, the Tenth Circuit held that such prior discrimination was not evidence of pretext in Mr. Simms's current litigation because it involved different decisionmakers. *Id.* at 1330. "Such a conclusive assertion is not probative of pretext unless the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand. . . . Mr. Simms fails to

establish such a connection, for he does not link any of the parties involved in the current employment action . . . to the employment actions that were the subject of the Simms I litigation". *Id.* (citations omitted).

Similarly, in *Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir. 2000), the Tenth Circuit repeated its earlier admonition that "'. . . anecdotal evidence of discrimination should only be admitted if 'the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand.'" *Id.* at 856 (quoting *Simms*, 165 F.3d at 1330). The *Heno* Court specifically held that "Plaintiff can meet this requirement by showing that the same supervisors were involved in prior discriminatory employment actions." 208 F.3d at 856.

In *Curtis v. Oklahoma City Public Schools Board of Education*, 147 F.3d 1200 (10th Cir. 1998), the Tenth Circuit reviewed the trial court's exclusion of testimony by other employees that they had been discriminated against by defendant. In affirming the evidentiary exclusions, the Tenth Circuit stated, "For such testimony to be relevant, however, the plaintiff must show the circumstances involving the other employees are such that their statements can "logically or reasonably be tied to the decision to terminate the plaintiff". *Id.* at 1217. The Tenth Circuit found that the testimony was properly excluded where, as here, it regarded an employee who worked in a different department than plaintiff, under a different supervisor. *Id.* at 1218.

Thus, the Tenth Circuit has made itself quite clear regarding the sole issue raised by Plaintiff, and determined

that issue squarely against her. Plaintiff's few citations to Tenth Circuit cases do nothing to bolster her Motion. In *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), a case cited by Plaintiff because another employee with a different manager was allowed to testify, Plaintiff ignores the fact that the Court explained its decision by observing that the other employee's manager had specifically referred to the plaintiff's early retirement as being "at K Mart's request" when encouraging the other employee to also consider retirement. *Id.* at 1156, n. 2. Indeed, the *Spulak* Court felt compelled to distinguish the *Schrand* case, *see supra*, on these very grounds. Plaintiff's reliance on *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), suffers from the same flaw. In that case, Plaintiff was terminated by the CEO. The other high-level executives permitted to testify had all also been replaced by younger individuals within months after the same CEO had assumed his new office. In *Bingman v. Natkin & Co.*, 937 F.2d 553 (10th Cir. 1991), another case cited by Plaintiff, there is not even any discussion as to who the relevant decisionmaker was. In *James v. Sears, Roebuck and Co.*, 21 F.3d 989, (10th Cir. 1994), there is no discussion whatsoever about the admissibility of evidence regarding acts of discrimination other than those being litigated. Although Plaintiff has omitted discussion of *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F.3d 1273 (10th Cir. 2003) in her Suggestions in Support, she did attempt to use that case to oppose Defendant's Motion in Limine on the same issue. As Plaintiff apparently now realizes, the *Minshall* case actually supports Defendant's position. In *Minshall*, the Court explicitly approved the admission of testimony by other employees about their own alleged experience of age discrimination

precisely because those employees were supervised and/or demoted by the exact same individual who recommended the termination of Mr. Minshall. *Id.* at 1285-1286.

In other words, based on Tenth Circuit law, this Court properly excluded the proffered testimony regarding alleged discrimination against other employees because none of it involved Mr. Reddick. None of the proffered witnesses reported to Mr. Reddick or were in his chain of command.[2] None of the proffered testimony attempted to connect Mr. Reddick to the alleged discriminatory acts. In fact, none of the proffered testimony even mentioned Mr. Reddick's name.

Plaintiff's resort to Eighth Circuit law also does not advance her case. First, particularly given the clarity of Tenth Circuit law regarding the legal issue in dispute, this Court need not look to the Eighth Circuit at all for the applicable law. Second, an examination of Eighth Circuit law makes clear that it too would approve the exclusion of the proffered evidence.

Although Plaintiff has repeatedly quoted the Eighth Circuit for general propositions about the use of "blanket exclusions" and "background evidence," Plaintiff has ignored the fact that, with regard to the specific issue at hand, the Eighth Circuit has repeatedly ruled in favor of Defendant's position. In *Kline v. City of Kansas City Fire Department*, 175 F.3d 660 (8th Cir. 1999), *cert. denied*, 528 U.S. 1155

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2. Defendant hereby incorporates its Memorandum in Opposition to Plaintiff's Offer of Proof Regarding Similarly Situated Employees Terminated as Part of a Reduction in Force, and the exhibits thereto, filed January 12, 2005. (Docket Doc. No. 121).

(2000), four female employees of the Kansas City Fire Department alleged various forms of discrimination. The trial court, *in limine*, excluded the plaintiffs' proposed evidence regarding discrimination against other female employees by supervisors uninvolved in the discrimination against plaintiffs. *Id.* at 664, 668. The Eighth Circuit specifically affirmed that ruling:

> We agree with the trial court that the acts of people who did not supervise or allegedly discriminate against the plaintiffs (and who in most cases did not even work in the same area as plaintiffs) are not probative of the city's motive, opportunity, intent, or knowledge. What little probative value such evidence might have, in any case, would be substantially outweighed by the threat of confusion of the issues and unfair prejudice.

Id. at 668 (parenthetical in original).

Thus, the Eighth Circuit, like the Tenth, excludes evidence regarding discrimination unrelated to the plaintiff's decisionmaker. Indeed, although Plaintiff relies extensively in her Suggestions in Support on the Eighth Circuit's opinion in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), and its progeny, Plaintiff fails to mention the most relevant portion of that opinion. The relevant issue in that employment race discrimination case was the trial court's evidentiary exclusion of prior acts of discrimination against black customers. The *Estes* Court explained its reversal of the trial court:

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> Ford argues that the treatment of black customers is sufficiently distinguishable from the treatment of black employees that evidence of Ford's discrimination against customers may not be probative. This argument might have merit if the Ford employees allegedly responsible for the discrimination against customers were unconnected with the employees who allegedly fired Estes. . . . Here, however, Estes alleged that the discrimination against black customers occurred in his own Service Department, and Estes alleged that the manager of the Service Department who authorized this practice also played a role in the decision to fire Estes.

Id. at 1104. In other words, according to the Eighth Circuit, the evidence was probative because it involved the same decisionmaker.

The Eighth Circuit applied *Estes* just that way in *Callanan v. Runyun*, 75 F.3d 1293 (8th Cir. 1996). In *Callanan*, the Eighth Circuit affirmed excluding testimony from other employees regarding discrimination at plaintiff's workplace, in part, because "to the extent that the testimony did identify discrete acts of discrimination, the witnesses did not complain that Callanan's own supervisors had engaged in any behavior that we could correctly characterize as improper". *Id.* at 1298. In support of that ruling, the *Callanan* Court explicitly distinguished its "admonitions in previous opinions" (regarding blanket exclusions and background evidence) by pointing to *Estes*. *Id.* After citing *Estes* regarding the potential dangers of blanket exclusions, the *Callanan*

Court also described *Estes* as "mentioning that evidence of an employer's past discriminatory acts may not be probative where the employees involved in the improper activity were unconnected with the employees who discriminated against the complainant". *Id.* In other words, although *Estes* stands for the proposition that background evidence can be relevant in some circumstances, it also stands for the proposition that background evidence is not relevant where the employees involved in the background discrimination are not the same employees involved in the discrimination at issue. Accordingly, the *Callanan* Court found that Ms. Callanan's witnesses' proffered background evidence was not relevant because it did not involve discrimination by the individuals alleged to have discriminated against her. *Id.*

Thus, Plaintiff's attempt to ignore the law of the Tenth Circuit is to no avail. Like the applicable law of the Tenth Circuit, the Eighth Circuit also would exclude testimony unrelated to the plaintiff's decisionmaker.

In any event, it is the law of the Tenth Circuit that applies in this case. That law makes clear that the Court correctly excluded Plaintiff's proffered evidence regarding discrimination not involving Paul Reddick.

III. Conclusion

For all the foregoing reasons, Plaintiff's Motion for New Trial should be denied.

Respectfully submitted,

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APPENDIX Y — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS OVERRULING THE MOTION FOR A NEW TRIAL DATED FEBRUARY 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

v.

SPRINT/UNITED MANAGEMENT COMPANY

Defendant.

ORDER

Ellen J. Mendelsohn brought this age discrimination claim against Sprint/United Management Company ("Sprint") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. On January 4 through January 7 and January 10 through January 13, 2005, plaintiff tried her claim to a jury. The jury rendered a verdict for defendant. This matter comes before the Court on plaintiff's *Motion For A New Trial* (Doc. #131) filed January 28, 2005.

Plaintiff asserts that the Court erred in excluding testimony of satisfactorily performing, long-term older employees whom defendant terminated. The Court ruled that such employees could testify only if Paul Reddick supervised

them. The Court finds that plaintiff is not entitled to a new trial. None of the proferred evidence makes it more likely that the decision makers in this case discriminated against plaintiff. Further, plaintiff inexplicably asserts that the jury commented that this was "a close case." *See Suggestions In Support Of Plaintiff's Motion For New Trial* (Doc. #132) at 10. In fact, the jurors stated that while counsel had presented plaintiff's evidence in the best possible light, this was not a close case because plaintiff presented no persuasive evidence of age discrimination.

IT IS THEREFORE ORDERED that plaintiff's *Motion For A New Trial* (Doc. #131) filed January 28, 2005 be and hereby is **OVERRULED**.

Dated this 28th day of February, 2005 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

APPENDIX Z — PRETRIAL HEARING STATUS CONFERENCE DATED JANUARY 29, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 03-2429-KHV

ELLEN J. MENDELSOHN,

Plaintiff,

vs.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant.

January 29, 2007

STATUS CONFERENCE

* * *

[3] (Whereupon, the following proceedings were had in chambers with all parties being present:)

THE COURT: Okay. Well, you all tell me what you want to talk about. We — as you know, we have the case set for trial on the 6th of February and you're the only case that we have. And it's going to be a very long time before that happens again. I know that you all are interested in filing an application — or I guess you did file an application for a writ of certiorari.

MS. MILLER: We filed a petition for rehearing and that was — we lost that 7 to 5 in the Tenth Circuit, so we're working for a petition for cert which we think we'll be able to file in the next two to three weeks. And we think it's a case that actually has the shot since the Circuits are definitely split.

THE COURT: On what?

MS. MILLER: On the issue of whether this other employee evidence is admissible in these types of cases.

MS. MILLER: So I know there are four other circuits that agree with you in your ruling and we agree with you in your ruling, obviously, and we'd like to keep it. So we've talked to [4] plaintiff's counsel and I think we'd really like to let our suspicion to run its course because obviously we don't want to take up a jury's time if there's a possibility the Supreme Court cert reverses and I think plaintiff agrees.

MR. EGAN: This is one of the few times we are actually in total agreement. Just for the fact of trying to be common sense about it, I kind of don't relish the idea of stretching it out and yet I do know it will take a while. I don't know what the chances are on cert, I really don't. We know that the odds are against it. But insofar as trying to do the practical thing as we sit here a week before the scheduled trial, it makes sense to us, and I've already asked the client what she thinks about it. If they don't get it, we actually have surprise of surprises. We've actually made a settlement demand and I think that I've tried to think whether or not it makes sense to have that go along until they get their appeal and their options

run out. It doesn't seem to — I mean, I've tried to think that out and didn't seem like that would run — that it would run counter to what they were talking about.

So I did tell Jim and Christine that under [5] the circumstances, we would not oppose a reasonable stay to see whether we are, once again, done with this thing.

THE COURT: Okay. Well, let's talk about the other things on the agenda because I'm disinclined to stay it. But tell me, I know that counsel raised other issues about witness lists and so forth. So let's talk about somebody on your side, maybe both sides, wrote a letter saying you had concerns about evidence at trial and witnesses and so forth.

MS. MILLER: Well, I know one of the issues, Judge, we thought might need to be addressed is that perhaps the deadlines should be set or plaintiffs should be required to update interrogatory responses and that sort of thing because we don't know what she's been doing the last couple years, what she's been doing or trying to work on, what's on that front. I don't know that there is, in having reviewed it, a particular need to reopen the exhibit lists and all that sort of thing.

It seems to me an offer of proof was made, you know, the last time and I assume we would still be dealing with the same witnesses that were [6] identified. And once that were opened up, a lot of the supervisors of these people, given the time, are no longer with the company.

THE COURT: Are they old and got RIF'd?

MS. MILLER: They're dead they're so old.

MR. EGAN: You finally get the picture.

MR. STREEN: I think they actually — at least one of the witnesses was RIF'd subsequently.

THE COURT: I know there's been a lot of stuff like that out there. I think there's reports they are still in the process of doing RIFs out there like —

MS. MILLER: I think they have had —

MR. EGAN: They just announced some others. They had not for some time.

MR. MONAFO: Ask Dennis why ask us?

MR. EGAN: I just read the papers.

THE COURT: Are you in agreement nobody feels like they need to revise their witness list and that sort of thing?

MR EGAN: No. I think maybe we do. I think that's an open question. What I wonder is, for instance, there will be room to say that under the ruling that we would get to put on, and we do have one of the our witnesses who we think we need, [7] if Carolyn Selberg(ph) was named if she was one of the five, because we have had a death. Are we able to use — are we stuck with using the same people that were identified in the first trial?

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THE COURT: Why would you have more than?

MR. MEYERS: Primarily, rediscovery of the witness case which you're aware of. We've had some two years' worth of discovery from the plaintiff's perspective, some 150 or so witnesses have been deposed, some even closer to location to this, you know, business unit, than some of the people that were previously identified and there's really a wealth of information that's available to both sides since counsel sitting on both cases, that was not available really, probably in fairness to either side, counsel at the time of the last trial.

THE COURT: Why was it not available at the time of the last trial?

MR. EGAN: Just hadn't done the discovery. We've been two years — two years, remember we tried it in January of 2005 and the discovery that's come up in the Williams case has actually been since that time during the year 2005 and the end of 2006. So it was just not — not knowing, not developed, and not memorialized in testimony as [8] it is now.

MS. MILLER: Well, that opens up a whole new can of worms, then. Obviously, I mean, I don't think when a case is, did you make an offer of proof and the Court says, yeah, okay, those people should be allowed to testify, that necessarily opens the door to anybody, whoever and whenever, and obviously if that's the case, then discovery would need to be completely reopened. None of this has been done in this case. And, you know, we might have to take a completely different tact depending on obviously who they name.

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THE COURT: It doesn't seem to me that when the Tenth Circuit remanded this case for further proceedings consistent with the Court, they issued — they were contemplating that we would reopen discovery and start the whole thing all over again. So the way I would read the order is that, you know, we're talking about, I think, were there four or five individuals who were identified that were discussing the Tenth Circuit order and those would be the universe of people we're talking about and I wouldn't see any need for reason to reopen discovery. And, as you know, when this case is four years old, so it seems to me it's in [9] everybody's best interests to get it wrapped up and put to bed. Is that your only issue with regard to witnesses?

MR EGAN: Well, no. Obviously, they would be calling some folks, I guess, in response to the witnesses that we would call and I guess I'd want to know something about who would be called by them.

MR. MONAFO: I think that's going — one of the problems is Dennis has been tied up in arbitration until the — literally until one o'clock today, so we haven't had a chance to talk about that recently. We did talk about that possibility, but listening to what the Judge is saying about, you know, just the order from the Tenth Circuit wasn't a reopening of all discovery, I don't know that we would do that. Because, obviously, if we did that, then they would want to do something and, you know, either I guess the door is open or it's not open.

THE COURT: Okay. So you're not thinking that you want to designate additional witnesses either.

MR. MONAFO: I'm looking at that, there's nobody really that we would — that, you know, it [10] would cause — if we tried to do that, it would just cause —

THE COURT: Okay. What else?

MR. EGAN: That would be it as far as discovery, frankly.

THE COURT: Okay. Well, I mean, I guess the question that I have, can we just roll back the clock and just leave the witness designations like they were, the exhibit lists like they were, and just put ourselves back in the status quo the way we were before we picked a jury the first time around and take it from there? Does anybody see any reason to do something different?

MR. EGAN: No. No. I don't, Your Honor.

I don't know. Coming into today, you know, we did not have any certainty — I guess what I would ask if we are number 1 on February 6th, I thought maybe you had another docket — a docket going that week. Is it possible -- because we're set to produce some experts in the other case, is it possible to go a couple weeks down so we can make sure we got our witnesses, we got everybody?

THE COURT: Huh-uh.

MR. EGAN: Can't do it?

THE COURT: Uh-huh.

[11] We could go months and months down, but that's what I'm trying to avoid because that's why I had Linda, you know, whenever we thought we were hearing something about the Tenth Circuit, I wanted to give you guys as much advance notice as we could and I thought the opinion might be coming down sooner than it did, but because of the rehearing and so forth, that delayed it. And I don't want to postpone this until the fall.

And in looking through the trial calendar, you know, it basically looks like we have this window of opportunity, it's not even a perfect opportunity, but do you still think it's going to be about what — I mean, what amount of time do you think it's going to be? I assume if you're doing all these additional witnesses, then we could be looking at a trial which is ten times as long, five times as long? I mean, it could be quite a bit longer depending on how much —

MR. EGAN: How could it be that?

THE COURT: Well, it depends on how much detail they want to get into and what these additional witnesses say and how much they want to go into detail refuting whatever their testimony is.

[12] MR. EGAN: I want to make sure that we understand. We would — the way I'm understanding what you would say is we would produce — try to get the five witnesses who were identified last time. The defendant has not identified any witnesses in response to them, has not identified any documents, so I would not think that we would — and we've just heard that they're not going to do so. So I

think that what we're talking about is we put on the five witnesses, they cross-examine with whatever they cross-examine with that's not additional documents, and so I think that it's within close to, I suppose, the same time frame that we had last time, nine days, ten days. I think we had eight trial days last time.

THE COURT: I think it was seven or eight.

MS. MILLER: But we had, what, nine or ten witnesses? And —

THE COURT: So you're saying none of the witnesses they've designated would be designated to refute the testimony of these witnesses. I'd have to pull out the list and look —

MR. EGAN: Yes, Your Honor.

THE COURT: I'd have to pull out the list and look. What was the timing of the motion in [13] limine? Was that before the witness designations were done or after?

MR. EGAN: Long after.

THE COURT: That's what I assume. Well, then, I mean if that's the case, then I suppose you could put those witnesses on and it would just be a question of the additional time it takes to cover those witnesses and do their cross-examination.

MR. MONAFO: So maybe ten days if trial — if it was eight last time.

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THE COURT: The reason I'm not inclined — the Tenth Circuit turned down your request to recall the mandate, right?

MS. MILLER: Right. I guess there's a panel and then there's a circuit justice or something like that. The panel voted to want to turn down.

THE COURT: It's not really clear to me what issue you would plan to seek cert on, but just, you know, from my review of the Tenth Circuit opinion, it looks like the way they threw this up was basically as an evidentiary issue and that isn't something that the Supreme Court has been real interested in. I read an article recently which was speculating as to why the incidence of [14] accepted cert petitions is down so low because it's like one of the historic low levels, I think, and the speculation is that because the Court is so evenly divided, both sides are wary of taking cert on an issue that they feel is important because they're afraid they don't have the votes to get their side to prevail and they would rather have a split in the circuits than to have authoritative Supreme Court cases on the wrong side of the issue. And for that — but also just because I don't see anything that — in this case that raises a substantial possibility that a petition for cert would be granted and, you know, I realize that you've got the right to file it, but I think that the chances are slim and none that it would be granted, and so it doesn't make any sense to me for us to delay before that eventuality.

And especially when you look at the age of the case, the public interest in the just and speedy and efficient resolution of cases and this is definitely at the top of our radar screen now. So at least that's my thought on that. It sounds like

there's not much to do except just roll out the same exhibits and things that we had before, right?

[15] MR. MONAFO: Dust them off.

THE COURT: Have you all — you said there is a settlement proposal out there?

MS. MILLER: Yes, Your Honor.

THE COURT: Do you guys — I really don't think that either one of you needs mediation or some kind of formal ADR, but I'll throw this out there.

MS. MILLER: I think the problem is, and I think generally with Dennis too, the client would like to exhaust their appeal rights and so they are interested in talking about a conditional settlement, not in this case per se, but that ruling, that's a problem, but obviously if we're trying next week, we can't really do a conditional. I mean, we can, but if the Supreme Court doesn't grant cert, we'll settle for X, I don't know if that's satisfactory to you.

MR. MONAFO: Judge, what would your feelings be on that if we were able to reach a settlement but it was conditioned upon our cert being denied? So if cert were —

MS. MILLER: The client doesn't want to give up their appeal right, which obviously if they settled, there's no controversy.

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[16] THE COURT: You know what? I would roll the dice and I would gamble ten days, of my standpoint, of trial time on cert being denied because basically that's what we're talking about. What do you think?

MR EGAN: Well, Your Honor, I think if they offered a settlement, we could settle the case. I mean, that's what I think would happen if they're interested in obtaining that.

MR. MONAFO: And the condition would just be you have to wait a couple — we would put the money in escrow or something and as soon as the denial came in, you get the money.

THE COURT: I mean, I went back and checked just to see like on the cases that I've been involved with what the delay is between filing a petition and the action on this petition, and it's looks to me like they must have a screening process that gets rid of frivolous ones within 30 days because I think the longest I've ever seen is like five months.

MR. MONAFO: I've heard that too.

MR. EGAN: Jim, if you guys would get a response and if it's enough, then we might recommend that because then that dispenses with the [17] case. And if you're successful on cert, well, more power to you, but I think it makes sense. But I think it's something where you'd have to get at it pretty quickly.

MR. MONAFO: I — you've been unavailable —

MR. MEYERS: Judge, that makes sense because you don't have to try the case.

MR. MONAFO: But if cert were granted and we went to the Supreme Court and we lost and they remand it had back to trial and .005 —

MS. MILLER: There is a small chance.

THE COURT: And I'll be the first one to say, hats off to you for good briefing if you can like convince the Supreme Court that this is the kind of case that they want to get involved in, but it just — it doesn't fit my paradigm of what I think is likely to happen, but, I mean, be an interesting experience doing it anyway, so.

MR. EGAN: Your Honor, what is your reaction if they would offer enough that we would say we could — you have done some kind of conditional things before, haven't you, or not?

THE COURT: Well, never exactly like this. I can't really think of a — I think the only kinds [18] of conditional things that have been proposed to me have been like in the middle of an employment case and maybe I think that this was a Sprint case, it was because you wanted to settle in the —

MR. EGAN: Definitely was something like that.

THE COURT: — middle and there was some issue about the wait time and I think it was resolved about having the plaintiff indemnify Sprint if she decided to accept the settlement agreement.

MR. EGAN: I don't recall those details, but I recall that they made sure there was a definite agreement so whatever the condition was, it was not a broad condition. It was something that would be met and it was met by Sprint so we took care of it.

THE COURT: So what would the proposal be exactly, that you would settle but it would be conditioned on —

MS. MILLER: We would agree to pay if, and only if, cert is denied.

MR. EGAN: At least that's a full final resolution of the case if that would happen, I mean, I really believe if that would happen and it [19] would be in a number agreed on by parties, I think it would be off the Court — it would go away. I'm with you that I think the chances of cert are one of those small, small percentages.

MR. MONAFO: So we all agree on that. We understand what we're up against.

MR. EGAN: I don't mean to beat that horse, it's just that, at least, that does have the possible promise of —

MS. MILLER: Ending it.

MR. MEYERS: The condition doesn't sound like an ambiguous one. It's an up or down we need to know whether the condition is met or not.

THE COURT: So if there's not a question of her having to repay the money.

MS. MILLER: No. We would just pay it if and when cert is denied.

MR. MONAFO: So it could be 30 days, you know.

MR. STREEN: I assume that means if cert is granted, but the outcome is the same, the case is settled.

MS. MILLER: Cert is granted — we've gone there with our client, but we'd certainly talk to them about it.

[20] MR. STREEN: That way we know we're done. Either you get cert, you pay money; you win on cert and we're done. Or you get cert but you lose the case.

MS. MILLER: There is one — there is a possibility that they tweak it or something is the only problem. But I agree with you, if they took cert and then affirmed the Tenth Circuit in full then probably the settlement should still apply. We'll talk to our client.

MR. STREEN: That way we all know the case is put to bed.

THE COURT: Let me ask, so the way you're imagining, the outcome of the cert petition would not have any effect on the settlement?

MR. STREEN: No. Either they win or lose. If they get a reversal, we're done because your verdict would be reinstated. If they don't get a reversal, then the settlement.

THE COURT: So what I think is the best — the best outcome you could hope for in the Supreme Court would be that the — well, no, the best outcome would be just to reinstate the verdict here, but another outcome would be to do what the sentence suggested which is to say it was error to [21] exclude those five witnesses and I should have done a better job of explaining what I was doing and why which is true and they could remand it for a new trial with better findings and explanations and rulings on the evidentiary issue. So I mean, I could see a scenario where we would not be done. And so then the question —

MS. MILLER: And they could even, I think, remand it for further clarification on why these people were, you know, they could do that too. They wouldn't have to order a whole new trial.

THE COURT: Now one thing I would just throw out there is after listening to all the evidence and considering the proffers and so forth at the time of the trial, it was my view that testimony would not have affected the outcome of the case in any way, you know, just having considered plaintiff was on the witness stand for a long time, we heard a lot from her, we heard a lot from the Sprint witnesses, and I visited with the jury afterwards and they did not believe that this was a close case.

Appendix Z

And so one thing you might consider is trying to structure a settlement that would give Sprint the right to pursue its petition for cert, [22] but disposes of this case, you know, for good or bad no matter what at the end of the day. And maybe you could have one price if certificate's denied and another if certificate's granted.

MS. MILLER: I don't know about that.

The only thing they are concerned about is effectuating any sort of settlement before we pull ourselves out of the game and the client doesn't want that.

THE COURT: Obviously, we can't have a conclusive settlement where which would take the ripeness and case in controversy out of the situation. But in my heart of hearts, I really don't think that this had any evidence — any effect at all on the outcome of the trial. And so I don't know. For whatever that's worth, you might think about ways to structure if you're going to settle so that there's — doesn't have to be another trial.

MR. STREEN: I guess the key question is how soon we can get this communication started and ended because —

MR. MONAFO: Today.

MR. STREEN: — the trial is rather imminent.

[23] THE COURT: Is your mediation done now? Was that —

MR. MONAFO: No.

MR. EGAN: No. I'm finished. I finished today.

THE COURT: Do you guys want to — I have to go at three o'clock anyway. Do you want a conference room where you can sit down and carry on this conversation?

MR. MONAFO: Yeah. We have half-hour, so.

THE COURT: Okay.

MS. MILLER: Unless you want to talk to us longer.

THE COURT: Okay. Well, good luck.

APPENDIX AA — FEDERAL RULE OF EVIDENCE 404(b)

Federal Rules of Evidence Rule 404(b), 28 U.S.C.A.
UNITED STATES CODE ANNOTATED
RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES
ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

155 b

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No. 06-1221

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In The

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1) Does Rule 401 of the Federal Rules of Evidence bar all evidence of other-supervisor discrimination or actions in an employment discrimination case?

(2) Does Rule 403 of the Federal Rules of Evidence invariably require, or in all cases authorize, the exclusion of evidence of other-supervisor discrimination or actions?

(3) Did the court of appeals err in holding that petitioner's in limine motion should have been denied?

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STATEMENT

For sixteen years Ellen Mendelsohn was employed as a mid-level manager for Sprint; in 2002 she was working at Sprint's headquarters campus in Overland Park, a suburb of Kansas City, Missouri. On November 22, 2002, Mendelsohn was laid off as part of a reduction in force ("RIF"). That RIF was among several phases of a centrally-directed, continuous reduction-in-force at Sprint, extending from October 2001 through March 2003, resulting in more than 14,000 terminations.[1] The number of jobs eliminated in each of Sprint's subsidiary business units, and the dates on which each RIF action was to occur, were determined at the highest management level at Sprint. The selection of the particular individuals to be laid off was overseen by the company's Human Resources Department, under enterprise-wide reduction-in-force rules and guidelines.

Mendelsohn brought suit in 2003, alleging she had been laid off because of her age, in violation of the Age Discrimination in Employment Act. Her complaint contained several allegations that Sprint had a "pattern and practice" of discrimination.[2]

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[1] The RIF is described in *Williams v. Sprint / United Management Co.*, 222 F.R.D. 483 (D.Kan. 2004).

[2] JA 11a ¶ 19("Plaintiff has observed a pattern and practice of Sprint laying off, and not finding jobs for, well-performing employees in their late 40's, early 50's, and older. Instead, Sprint has separated or demoted employees in the protected age group, whereas for younger employees Sprint finds alternative jobs if the current jobs of younger employees are restructured or

The In Limine Motion and Order

Before trial, Sprint filed a motion in limine to exclude much of the evidence Mendelsohn proposed to offer. The defendant asked the district court to bar

> [p]laintiff, her counsel, and her witnesses from directly or indirectly introducing evidence, argument or other reference, in the presence of the jury, . . . [of] Sprint having a "pattern and practice" of age discrimination, a culture of age discrimination, a history of age discrimination, or any similar broad allegation of age discrimination . . . . and/or any reference to specific allegations of discrimination against Sprint employees not similarly situated to Plaintiff.[3]

Sprint argued that "[e]mployees may be similarly situated," and evidence about them admissible, "only if they had the same supervisor, and the decisions regarding their employment were made by the same decisionmakers." (JA 163a). The motion also asked the court to preclude plaintiff from offering evidence that made "[a]ny reference to age-derogatory remarks by any Sprint employee." (JA 157a, ¶ 5).

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eliminated."), 11a ¶ 22 ("Defendant Sprint, by and through its officers, employees and agents, engaged in a continuing pattern and practice of discrimination . . ."), 12a ¶ 23 ("As a direct and proximate result of defendant's continuing pattern and practice of discrimination . . . plaintiff suffered actual damages . . . .").

[3]JA 155a ¶1.

The district court granted the motion, forbidding plaintiff from offering any

> evidence that Sprint has a pattern and practice, culture or history of age discrimination . . . and [of] discrimination against employees not similarly situated to plaintiff. . . . Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for the purpose of this ruling, requires proof that (1) Paul R[e]ddick was the decision-maker in any adverse employment action; and (2) temporal proximity.

(Pet. App. 24a). The order also barred evidence of biased remarks by any company official other than Reddick. (*Id.*). The district court apparently accepted Sprint's argument that exclusion of any evidence of discrimination by supervisors other than Reddick was required as a matter of law by specific Tenth Circuit precedent. (Pet. App. 2a-3a, 14a-15a n. 3).

The blanket exclusionary order severely limited Mendelsohn's ability to prove her claim. There were *no* Sprint employees who met the court's narrow definition of "similarly situated"; Sprint claimed that Reddick had laid off only two workers, and Mendelsohn was the only one over 40. (Tr. 267). The order preordained that plaintiff was unable at trial to call a single non-hostile live witness to support her allegation of discrimination. Aside from Ms. Mendelsohn, the only witnesses plaintiff's attorney was able to call were current Sprint officials and employees who testified as hostile witnesses. Because

of the limiting effect of the order on plaintiff's sources of proof, defendant found it unnecessary to call any defense witnesses, and rested immediately after plaintiff. (Tr. 1323).

The Proffered Evidence

Before the close of plaintiff's evidence, Mendelsohn made an offer of proof.[4] Mendelsohn referred the court to the depositions of five witnesses[5]. Plaintiff also provided the district court with a written summary of the testimony at issue and proffered one documentary exhibit. (JA 342a-351a).

One proffered witness would have offered key testimony about the overall impact of the Sprint layoffs. At least twice a week for a year the witness had visited the out-placement center established by Sprint. He reported that the "vast majority" of the laid off workers at the center were over 40.[6] Another witness, a former supervisor, would have testified that the pattern of Sprint layoffs was that

> a younger work force had been maintained while an older work force was not. . . . [B]ased on the people that I know that have been RIF'd

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[4] The district judge directed counsel for Mendelsohn to make the offer of proof in this form.

[5] Bonnie Hoopes, John Hoopes, Yvonne Wood, Sharon Miller and John Borel. Their depositions had earlier been made part of the record.

[6] JA 349a; J. Hoopes Dep. 43-44, 53-54.

> . . . the majority of those people being older people.

(Miller Dep. 113.)[7] The order barred Mendelsohn herself from repeating at trial her similar testimony regarding her observations on the pattern of layoffs at Sprint.[8]

It was widely known, according to one witness, that a Sprint Vice President had made comments about the need for "a faster, more vital group of people." There was "pretty much a general understanding throughout the organization" that the Vice President "wanted younger employees."[9] "[I]t was a pervasive understanding in the corporation" that the official's "comments [that] . . those who wouldn't or couldn't keep up would be gone had to do with individual's ages."[10] According to the proffered testimony, there was "a set of expectations of how people are to operate at the management level," and with regard to "how the

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[7] The witness arrived at her conclusion that there was widespread age discrimination

> [b]ased on the number of people that I've seen since the RIF that are long-term employees, older employees that have been RIF'd and knowing that there are positions in Sprint that are being filled by younger employees just from observation.

(Miller Dep. 109).

[8] Mendelsohn Dep. 92-93.

[9] Miller Dep. 73.

[10] Miller Dep. 76.

RIF was [to be] conducted" the expectation was that there would be layoffs "because of people's ages."[11]

Another witness described having been inadvertently sent a RIF spreadsheet, intended only for higher management, that would systematically spell out the ages of workers who were to lose their jobs. The witness was emphatically told to destroy her copy of the document, which she interpreted as a tool to facilitate age discrimination. The spreadsheet had been prepared by one official at the request of a second official to be circulated to yet another company manager.[12] The witness had complained in vain about the document to a Sprint Director; a Sprint Vice President, and the company Human Resources Department.[13]

Each of the five proffered witnesses, all of whom were over forty, would have testified to facts supporting an inference that he/she had been laid off because of age. All of those witnesses were working for Sprint in the Kansas City area, several of them at the same Overland Park office complex as Mendelsohn. Four of the five, like Mendelsohn, had been in Sprint's PCS (wireless) Division. One of the five[14] was laid off on November 22, 2002, the same day as Mendelsohn,

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[11] Miller Dep. 119.

[12] JA 344a-45a; Wood Dep. 48-51, 77-78.

[13] Wood Dep. 91, 92, 95, 98.

[14] Bonnie Hoopes (Bonnie Hoopes Dep. 49).

another was laid off the day before[15], and several others lost their jobs within three months of Mendelsohn's dismissal.[16] The observations and experiences of these individuals were particularly significant because the assertedly pretextual methods used to discriminate against these witnesses were similar to the methods by which Mendelsohn claimed to have been discriminated against.[17]

Two witnesses described being pressed not to hire workers because of the prospective employee's age.

> Q. I believe you indicated that Ted Stock [Director] didn't want to hire Chuck Jones; is that right?
> A. That's correct.
> Q. And I think you indicated that it was because he wanted someone younger; is that right?
> A. That was the comment that he made. . . . [Stock] expressed the concern of can't we find someone who's younger and just more qualified or just as qualified or some -- can we take a look at some other younger candidates.

(Miller Dep. 53). The other witness described being required to get "vice president approval" to hire any

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[15] Sharon Miller (JA 345a; Miller Dep. 87).

[16] Yvonne Wood (January 14, 2003; Wood Dep. 41); John Borel (Feb. 26, 2003; Borel Dep. 33, 38).

[17] See pp. 46-49, *infra*.

new worker who was over 40,[18] and being pressed to justify hiring a 48 year old worker rather than looking instead for a younger recent college graduate.[19]

Several witnesses would have testified that other statements of bias against older workers were made repeatedly and openly by Sprint officials. One witness described hearing such remarks "frequently," "at least a couple of times a month."[20]

> [A]n example would be [a Director's] comment that he felt he had too many older people and ailing people, old, sick people in his department. . . . He frequently made references about his concerns about a couple of other employees . . . who were older and made comments about waiting for layoffs to [occur] so that he could clean up his department.[21]

That official's biased remarks were repeated in the presence of other senior managers.[22] The witness had complained in vain about the remarks to a Sprint Vice

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[18] J. Hoopes Dep. 57; JA 123a; 348a.

[19] J. Hoopes Dep. 60-61.

[20] Miller Dep. 31, 32, 59.

[21] Miller Dep. 26-27.

[22] Miller Dep. 33, 38-40.

President[23] and to other officials.[24] Bonnie Hoopes, who was fired the same day as plaintiff, had been told by her supervisor "that I was too old for the job."[25] Ms. Hoopes had received a memorandum (excluded under the in limine order), circulated by her supervisor, that quoted with approval a book which described the most desirable employees as those who were "blessed with lots of runway ahead of them."[26] That memo was circulated to at least four Sprint officials, and was expressly intended to assure that the recipients had a written copy of that admonition, which had been quoted at an earlier meeting of Sprint officials.[27]

The in limine order precluded the plaintiff from offering inculpatory evidence or arguments regarding actions of supervisors other than Reddick; the order did not, however, forbid Sprint from offering *exculpatory* evidence or arguments based on conduct by other supervisors. Although the plaintiff was forbidden to offer evidence of biased remarks by

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[23] [The Vice President] kind of sluffed it off to an extent as far as I could tell. I think she was protective of him. I think her comment was, "I think you must have misunderstood him" or "he was under pressure" . . . .

Miller Dep. 38.

[24] Miller Dep. 33.

[25] JA 344a; Bonnie Hoopes Dep. 93, 95.

[26] JA 350a.

[27] JA 350a.

supervisors other than Reddick, Sprint was permitted to--and did--offer evidence suggesting that other supervisors never made such remarks. The defendant designated just such exculpatory testimony from a deposition that was read to the jury:

> Q. And the next category is age biased comments by defendant's management toward older employees. Did you know anything about that?
> A. No. I never saw that.

(Browne Dep. 31-32; see Tr. 330-31). Plaintiff was expressly barred from responding to this by introducing evidence to the contrary.

The district court also permitted Sprint to substantiate the need to lay off Mendelsohn by offering evidence the RIF had encompassed the entire PCS Division in which Mendelsohn worked, with "close to 500" other people laid off from that Division during that RIF.[28] Almost all of those 500 laid off workers

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[28] At trial one of plaintiff's central arguments was that, although she had been told she lost her job due to a reduction in force, the size of her particular unit--the Mobile Financial Services unit--had actually increased after she left. (Tr. 116). As to that unit, what actually occurred in late November 2002 was that the oldest worker was laid off, and then the unit as a whole expanded by two. If that was all the jury knew about the events of the fall of 2002, it might have regarded Reddick's explanation with considerable skepticism. Thus it was very important for Sprint to be able to show that there were actually net reductions in employment--made by supervisors other than Reddick--in the

(like plaintiff's excluded witnesses) had not been chosen by Reddick. Those 500 laid-off PCS workers referred to in this exculpatory testimony included four of the five over-40 workers whom plaintiff had been forbidden to call as witnesses.[29] The trial judge explained that "the jury needs to have a fair understanding of what's involved in the entire process." (Tr. 230-31). Under the in limine order, however, that "fair understanding" did not include disclosure to the jury that several employees among that larger PCS group had harrowing stories to tell about age discrimination and biased remarks in PCS.

In closing argument, counsel for Sprint took full (if not excessive) advantage of the exculpatory deposition testimony that it had read into the record:

> [A]n ex-employee who is disgruntled and a friend of the plaintiff, Ellen Mendelsohn, told you very clearly in his deposition testimony he never saw any evidence of age discrimination at Sprint.

(Tr. 1346). Taking full advantage of the fact that plaintiff had been forbidden to offer any evidence of discrimination or biased remarks by Sprint officials other than Reddick, counsel for the defendant argued:

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wider PCS unit of which the Business Development & Strategy Group was a part.

[29] Bonnie Hoopes, Yvonne Wood, John Borel and Sharon Miller.

> We've had six days of evidence. We've been through binders and binders of documents and there is not an iota of evidence of age discrimination here.

(Tr. 1346).

SUMMARY OF ARGUMENT

The district court's blanket exclusionary order improperly prohibited introduction of four broad categories of evidence: (1) evidence of a pattern and/or practice of age discrimination, (2) evidence of a culture or history of discrimination, (3) evidence of age-biased remarks by any Sprint official except the particular supervisor who assertedly selected Mendelsohn for layoff, and (4) any other evidence of other-supervisor discrimination that might support Mendelsohn's age discrimination claim. In appropriate circumstances, each of these types of other-supervisor evidence can easily satisfy the relevance standard in Federal Rule of Evidence 401.

Rule 401 requires only that proffered evidence have "any tendency to make the existence of any fact that is of consequence . . . more or less probable." Evidence is relevant under Rule 401 if an individual who genuinely needed to know the merits of a claim or defense might reasonably want to have the information in question. That standard is met if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." 2 *Weinstein's Federal Evidence* § 401.04[2][c][ii].

Two types of pattern and/or practice evidence are relevant to an employment discrimination case. First, evidence suggesting the existence of a pattern of discrimination at the employer, or in the relevant business unit, is "competent evidence." *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973). Statistics are one, but not the sole, example of such evidence. Second, evidence of a pattern and/or practice of discrimination may in some cases be so compelling as to suffice by itself to meet the plaintiff's burden of proof, and shift the burden of proof to the defendant. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The evidence relied on by the Court in finding such a pattern and/or practice in *Teamsters* included 40 specific instances of discrimination, precisely the type of evidence that Sprint insists should be deemed inadmissible "me,too" evidence. 431 U.S. at 338.

The existence of a culture of discrimination is relevant because it tends to explain why a particular supervisor might have engaged in discrimination. *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003)("culture of discrimination" in Dallas County Prosecutor's office). Discriminatory actions and statements by superiors or peers can create a "discriminatory atmosphere in which individuals could justify their bias." *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995).

Discriminatory remarks by other supervisors can also be a telling indicator of the environment at a plant or office. A supervisor who makes such a remark to one or more company witnesses manifestly believes that he or she will not be disciplined for that statement. A reasonable jury could infer that such a

supervisor had correctly discerned that company officials regarded such discrimination with tolerance or even approval. That is particularly true where, as here, the remarks were made by an official with "authority to render personnel decisions." *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 133 (3d Cir. 1997).

Acts of discrimination by other supervisors may also bear directly on a claim that the employer's proffered reason for the disputed adverse action was merely a pretext for discrimination.

The use of other-supervisor evidence is not limited to plaintiffs. Defendants can and often do rely on exculpatory other-supervisor evidence. *E.g., Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

In determining the admissibility of evidence, the trial judge need not personally find the evidence probative. The proper inquiry is instead whether "a reasonable person acting as trier [of fact] could assign some weight to the evidence." 1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:1.

Rule 403 does not always require or authorize the exclusion of other-supervisor evidence. The problems with which Rule 403 is concerned will not invariably be present, and can usually be dealt with by an appropriate jury instruction. In administering Rule 403, courts should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Weinstein's Evidence* ¶ 403(3). Evidence may be excluded only when its

"probative value is substantially outweighed" by one of the Rule 403 factors. The Tenth Circuit properly held that standard was not met, and the blanket exclusionary order could not stand.

ARGUMENT

I. RULE 401 OF THE FEDERAL RULES OF EVIDENCE PERMITS THE USE OF OTHER-SUPERVISOR EVIDENCE IN AN EMPLOYMENT DISCRIMINATION CASE

The blanket exclusionary order barred completely any testimony or documentary evidence regarding discriminatory actions or statements by any Sprint official other than Paul Reddick. Under Rule 401 such other-supervisor[30] evidence is relevant if it has

> *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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[30] As the United States notes, the in limine order was not limited to testimony that there had been acts of discrimination against the proffered witnesses themselves. (U.S. Br. 13 and n. 1). The government accurately characterizes the in limine order, and the subject matter of instant appeal, as more broadly concerning other-supervisor evidence.

Fed. R. Ev. 401 (emphasis added).[31] That standard is met if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." 2 *Weinstein's Federal Evidence* § 401.04[2][c][ii], at 401-25 (Joseph M. McLaughlin ed., 2d ed. 2007). In common sense terms, evidence is relevant under Rule 401 if an individual who genuinely needed to know the merits of a claim or defense might reasonably want to have the information in question.

"Rule 401 sets a purposely low gateway threshold for the introduction of evidence." (U.S. Br. 14). "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); *Huddleston v. United States*, 485 U.S. 681, 691 (1988). "Sometimes . . . the proof is fragmented and consists of many facts. Alone, each has little or no probative force, but the whole (the conjunction of all the facts) may almost impel a conclusion." 1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:2 at 557 (3d ed. 2003).

To meet the requirement of Rule 401, a piece of evidence need not be sufficient by itself to support a finding for the proponent of the evidence on an issue of consequence. Most evidence is not conclusive, because it is almost always possible to imagine circumstances,

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[31] A "fact of consequence" may be "ultimate, intermediate or evidentiary . . . so long as it is of consequence to the determination of the action." Advisory Committee Notes.

sometimes plausible ones, which if present would dispel the probative value of the evidence. The possibility that those circumstances actually existed, however, impacts only the persuasiveness of the evidence, not its admissibility; "flaws affect weight, not relevance." 2 *Weinstein's Federal Evidence* § 401.06, at 401-42.1.

> [T]he common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. . . . That more than one inference could be drawn is not enough to render the evidence irrelevant.

J. W. Strong, *McCormick on Evidence*, 278 (5th ed. 1999).

> [E]ven in the cases of shaky evidence, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" such evidence, not exclusion.

Robinson v. Runyon, 149 F. 3d 507, 515 (6th Cir. 1998)(*quoting Doe v. Claiborne County, Tennessee*, 103 F. 3d 495, 515 (6th Cir. 1996)(*quoting Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993))).

There is a "judicial inhospitability to blanket evidentiary exclusions in discrimination cases." *Quinn v. Consolidated Freightways Corp. v. Delaware*, 283 F.

3d 572, 578 (3d Cir. 2002). The trial court's blanket exclusionary order barred all other-supervisor evidence, including evidence of "a pattern and practice . . . of discrimination," evidence of a "culture or history of discrimination," evidence of specific instances of other-supervisor evidence, and evidence of biased remarks by any Sprint official or manager other than Reddick. The district judge concluded that Tenth Circuit precedent always mandated this sweeping exclusion of other-supervisor evidence.

The district court erred in holding that each of these broad categories of evidence is invariably irrelevant under Rule 401.

A. Rule 401 Permits Use of Evidence of A Pattern And/Or Practice of Discrimination

The district court erred in barring all evidence of a pattern and/or practice of discrimination.[32] Both this

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[32] The court of appeals held, in part, that the in limine order was improper because it barred the plaintiff from offering evidence of a pattern and/or practice of discrimination. (Pet. App. 6a-10a).

In the court of appeals, Sprint asserted that the plaintiff had somehow waived her contention that there was a pattern and/or practice of discrimination in this case. Brief for Appellee, No. 05-3510, p. 13. The court of appeals concluded that the dispute about pattern and/or practice evidence was properly before it, and devoted much of its opinion to resolving that question. (Pet. App. 6a-10a and n. 2).

Petitioner did not seek review in this Court of the Tenth Circuit's fact-bound determination that respondent had adequately preserved this issue. In its merits brief, however,

Court and the lower courts have long and quite properly relied on evidence of a pattern and/or practice of discrimination in determining whether an individual was the victim of intentional discrimination.[33]

The language used by the courts in referring to this type of proof has varied; the decisions of this Court[34] and the lower courts[35], without any evident difference

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petitioner asserts (as it did without success in the court below) that the plaintiff somehow waived her right to offer pattern and/or practice evidence. (Pet. Br. 3, 33). That issue is not within the scope of the Question Presented.

[33] In its closing argument, Sprint insisted that the absence of any evidence of a pattern of discrimination was quite significant:

> Where is the evidence of age discrimination in this case? . . . [Counsel for plaintiff] keeps telling you no one admits that they made a decision based on age . . . . Well maybe that's true in most cases, but you know what? There's usually some evidence of it . . . [T]here's usually some sort of pattern to those actions that tends to show age discrimination.

(Tr. 1345).

[34] For example, in *Teamsters* this Court variously characterized the evidence in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), as having established a "pattern *and* practice," a "pattern *or* practice," a "pattern" and a "policy" of discrimination. 431 U.S. at 359-63 and nn. 45-46 (emphasis added).

[35] In the court of appeals several such phrases are used interchangeably. Pet. App. 6a ("general policy and practice," "a

in meaning have referred interchangeably to a "pattern and practice," a "pattern or practice," or simply a "pattern" or a "practice." In some cases, such as *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), this Court and the lower courts use the phrase pattern and/or practice to refer to a category of evidence that is probative of discrimination. In other cases, such as *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the courts use this phrase differently, to refer to evidence so persuasive that it establishes a presumption that discrimination occurred against the plaintiff, a class, or (in a case brought by the government) asserted victims.

Mendelsohn's proffered pattern evidence is more aptly analyzed under the *McDonnell Douglas* framework. The district court's order, however, clearly would bar *all* such evidence.

Teamsters Pattern and/or Practice

In *Teamsters* this Court held that the proof that established a pattern and/or practice of widespread discrimination was sufficient by itself to require (absent rebuttal) a finding of discrimination as to each unsuccessful minority applicant:

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pattern of dismissal based on age"), 6a n. 2 ("pattern and practice").

In its in limine motion, petitioner used the phrase "pattern and practice." (JA 155). In its brief in this Court, petitioner uses the phrase "pattern or practice." (Pet. Br. 3, 33).

> The proof of the pattern or practice supports an inference that any particular employment decision [was discriminatory]. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination.

431 U.S. at 362. In holding that the unusually compelling pattern and/or practice[36] evidence in *Teamsters* had created a presumption that discrimination had occurred against each of the alleged individual victims, this Court necessarily found such evidence was relevant to those individual claims. In private class actions, the phrase pattern and/or practice is often used to denote, as in *Teamsters*, evidence which shifts that burden to the defendant. *Cooper v. Federal Reserve Board*, 467 U.S. 867, 876 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

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[36] *Teamsters* described the evidence of discrimination sufficient to shift the burden of proof in various terms, such as "more than . . . isolated," 431 U.S. at 336 (a less demanding standard); "regular," 431 U.S. at 359-60 (a seemingly intermediate standard); and as "standard operating procedure," 431 U.S. at 336 (a more demanding standard). The evidence of discrimination relied on by the United States concerned only ten of the company's fifty-one terminals. *United States v. T.I.M.E.-D.C., Inc.*, 517 F. 2d 299, 304 (5th Cir. 1975). The quantum of evidence sufficient to establish a *Teamsters* pattern and/or practice is affected by the fact that the defendant has the best access to proof. 431 U.S. at 359 n. 45. The resolution of the instant case does not require clarification of this standard.

In establishing the pattern and/or practice in the *Teamsters* sense, the United States relied both on statistics and on "testimony of individuals who recounted over 40 specific instances of discrimination." 431 U.S. at 338. This is precisely the type of anecdotal evidence barred by the blanket exclusionary order here, and the "specific instances" relied on by this Court in *Teamsters* are what Sprint dismissively insists are inadmissible "me, too" evidence. In finding that there was a pattern and/or practice of discrimination, the trial court in *Teamsters* had expressly credited these government witnesses. 431 U.S. at 338. This Court approved the use of such evidence to support a finding of pattern and/or practice and noted that, although statistics were often used to help prove the existence of a pattern and/or practice, such a pattern might be demonstrated solely "by examining the discrete decisions of which it is composed." 431 U.S. at 360 n. 46.

Teamsters involved a quintessential use of other-supervisor evidence. The evidence relied on to establish the presumption of discrimination against each individual alleged discriminatee necessarily rested largely on evidence of discrimination against persons other than that particular claimant. The statistical evidence in *Teamsters* revealed a pattern of company-wide discrimination by T.I.M.E.-D.C., Inc., a pattern that encompassed thousands of employees at ten terminals in as many states.[37] As to any specific claimant relying on the proven pattern and/or practice,

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[37] *United States v. T.I.M.E.-D.C., Inc.*, 517 F. 2d 299, 304 (5th Cir. 1975).

most of that statistical and anecdotal evidence would have summarized actions taken by other supervisors. The finding of a pattern and/or practice in *Teamsters* was based in part on evidence about acts of discrimination against forty specific minority drivers; the presumption created by that evidence, however, extended to all of the hundreds of minority drivers encompassed by the litigation. See 431 U.S. at 337.

McDonnell Douglas Pattern and/or Practice Evidence

This Court and the lower courts have also used the phrase pattern and/or practice to refer to evidence which is clearly not as compelling as the evidence in *Teamsters*.[38] *McDonnell Douglas v. Green*, supra, decided "the order and allocation of proof in a private, non-class action." 411 U.S. at 800. This Court held with regard to Green's individual hiring claim:

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[38] As the United States correctly observes,

> [i]n order to be relevant . . . a pattern of discrimination against members of a protected group need not be so widespread and systematic as to support an inference that discrimination is the employer's standard operating procedure and that each individual denied an employment opportunity who is a member of the group is more likely than not a victim of discrimination. Like other circumstantial evidence, a pattern of discrimination is relevant if it makes it more probable that the plaintiff is a victim of discrimination, even if the increase in probability is not great.

U.S. Br. 19.

> [E]vidence that may be relevant to any showing of pretext includes facts as to . . . petitioner's general . . . practice with respect to minority employment.

411 U.S. at 804-05 (footnote omitted). The Tenth Circuit expressly relied on this Court's holding. (Pet. App. 6a)(*quoting McDonnell Douglas*). *McDonnell Douglas* explained:

> [findings] that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices, . . . while helpful, may not be in and of themselves controlling as to an individualized hiring decision.

411 U.S. at 805 n. 19.[39] Such proof, although not shifting the burden of proof to the defendant as in *Teamsters*, was still "relevant" and "competent

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[39] Similarly, in *Miller-El v. Dretke*, 537 U.S. 322 (2003), in finding that a certificate of appealability should have been issued, the Court relied in part on evidence that even prior to the jury selection in that case there was a pattern of exclusion of African-Americans from jury service. 537 U.S. at 331, 346. This pre-existing pattern (like the evidence described in *McDonnell Douglas*) was deemed to provide support to Miller-El's claim of discrimination in his own case. The exclusion of African-Americans from prior juries was largely the result of the exercise of peremptory challenges by Dallas County prosecutors other than the two attorneys in the *Miller-El* case itself; it was other-prosecutor evidence.

evidence," 411 U.S. at 804-05, in a "private, non-class action," such as Mendelsohn's.

The type of evidence referred to by the Court in *McDonnell Douglas* — regarding workforce "composition," "general" practice, and statistics — necessarily was evidence about how minority employees or applicants other than Green himself had been treated by the employer. Considering the size of McDonnell Douglas, virtually all of the actions thus depicted or summarized would have been taken by supervisors other than the particular official who decided not to re-hire Mr. Green.

Pattern and/or practice evidence that is probative proof under *McDonnell Douglas* is in some instances different than the type of evidence relied on in *Teamsters*. *Teamsters* pattern and/or practice evidence, like proof of a pattern and/or practice in a class action, refers to pattern and/or practice evidence regarding the specific kind of discriminatory practice alleged, e.g. a pattern and/or practice of discrimination in layoffs. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). *McDonnell Douglas* pattern and/or practice evidence, on the other hand, need only involve the same type of discriminatory purpose, e.g. age or race or gender discrimination to be relevant to "any showing" of pretext. Thus in *McDonnell Douglas*, although the plaintiff alleged racial discrimination in the recall of a furloughed worker, the Court held that discrimination in the company's overall work force composition--largely the result of discrimination in hiring--would be probative evidence. 411 U.S. at 804-05. In other instances, *McDonnell Douglas* proof may be similar in kind to the

evidence in *Teamsters*, but less compelling. For example, the other examples of discrimination relied on might not be as numerous as the forty instances in *Teamsters*, or statistical evidence might not be used, or might control for fewer variables. Those differences at times will often be the result of the discovery and litigation cost involved; the sort of elaborate presentation made by the Department of Justice in *Teamsters* would be far beyond the means of an individual plaintiff such as Ellen Mendelsohn.

This Court has endorsed the universal lower court practice of permitting plaintiffs (and defendants) to rely on statistical evidence to support (or oppose) a claim of intentional discrimination:

> Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

Teamsters, 431 U.S. at 340 n. 20 (*quoting United States v. Ironworkers Local 86*, 433 F. 2d 544, 551 (9th Cir. 1971)).

Statistics, of course, are not the only permissible method of demonstrating a pattern of action by an employer. Here, for example, such a pattern was depicted (albeit without mathematical precision) by the proffered evidence that the "vast majority" of former Sprint workers seeking out-placement were over forty. (JA 349a). At least where a meaningful

pattern can be established in that way[40], individual plaintiffs are not required to incur the possibly prohibitive cost of retaining a statistical expert and conducting a multi-factor computer analysis. While possibly "helpful," statistics are not required. *McDonnell Douglas*, supra, 411 U.S. at 805.

This Court has made clear that defendants too may rely on other-supervisor evidence when it is exculpatory in nature. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court explained:

> the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that its work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent.

438 U.S. at 580. The probative value of such exculpatory other-supervisor evidence was for the trier of fact. *Id.* In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), following an EEOC action in which the lower courts determined the defendant had *not* engaged in a system-wide pattern and practice of discrimination, several individual former class members brought suit. In holding that those individual claims could proceed, this Court,

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[40] *See, e.g. Koster v. Trans World Airlines, Inc.*, 181 F. 3d 24, 33 (1st Cir. 1999); *Ryther v. KARE 11*, 108 F. 3d 832, 842 (8th Cir. 1997)(en banc); *Greene v. Safeway Stores, Inc.*, 98 F. 3d 554, 560-61 (10th Cir. 1996); *Bingman v. Natkin & Co.*, 937 F. 2d 553, 556 (10th Cir. 1991).

citing *McDonnell Douglas*, explained that "the determination in the [earlier class] action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext." 467 U.S. at 880. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513-14 (1993), the Court held that "[t]he disproportionately [large] minority makeup of [a] company's work force" could be relied on as exculpatory evidence.

All of these decisions, petitioner now suggests, were wrong. Regardless of the extent of discrimination on the part of the other supervisors in *Teamsters* or *McDonnell Douglas*, and regardless of how exemplary the other supervisors were in *Furnco* or *Cooper*, Sprint contends that their actions were "substantively irrelevant" to the claims of any individual plaintiffs or claimants in those cases, because there was no "link" or "nexus" between the actions of those supervisors and the actions of the particular supervisor that affected each specific plaintiff. (Pet. Br. 9). Rule 401, petitioner insists, forbids the use of statistical evidence except where it is based on and "drawn from persons affected by the same supervisor decisionmaker." (Pet. Br. 27 n. 9.) Where, as would frequently be the case, the particular supervisor in question personally had made too few decisions to permit any statistical analysis, there would be no statistical evidence with the requisite link to the disputed employment action.

Rule 401 assuredly does not bar the use of all this evidence. In employment cases "the relevance of statistics in general is indisputable." 2 *Weinstein's Federal Evidence*, § 401.08[11] at 401-74. The link among the supervisors at issue in *Teamsters* and in

McDonnell Douglas is the same link that exists among the Sprint supervisors in the instant case--at the relevant time they all worked for the same employer. Fellow supervisors employed by the same organization are not unrelated strangers who, like the pilgrims in Chaucer's *Canterbury Tales*, happen by some stroke of fate to find themselves housed in the same office building or complex. To the contrary, fellow supervisors typically have for years worked under the same leadership, been guided by and interpreted the same memos, e-mails, speeches and comments from the same managers, had access to the same computer files, attended the same or similar meetings[41], and talked in overlapping circles at the same lunches or around the same water coolers. That is why a reasonable trier of fact in the instant case could care about age discrimination by other Sprint supervisors in the 2001-03 RIF, but not about age discrimination by supervisors at AT&T or Deustche Telekom.

Sprint argues that other instances of discrimination are not probative because its process for making layoffs was "decentralized." (Pet. Br. 34). There might, of course, be employers whose officials are so scattered and so isolated from one another that no reasonable inferences could be drawn about one

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[41] See Tr. 764; 1100 (describing key "leadership meeting" attended by Reddick and other supervisors).

from the actions of another.[42] In this case, however, the supervisors in question worked near one another, and there was substantial evidence that the RIF process was highly centralized and coordinated from the top.[43] Sprint would, of course, be free on remand to seek to persuade the jury the Sprint supervisors who worked a few hundred yards from each other in Sprint's Overland Park office complex were so unconnected — but Rule 401 does not presume that to be true.

Petitioner suggests the only circumstance in which evidence of a pattern and/or practice of discrimination would be relevant is if plaintiff could first show both (a) that there had been an overt "expression of ageist attitudes by senior management" (Pet. Br. 31)[44] and (b) the declaration of discriminatory policy had in fact affected both the plaintiff's own supervisor and the other supervisors in question. (Pet. Br. 32-33). But no

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[42] The distances among the supervisors would not necessarily preclude use of other-supervisor evidence. In *Teamsters* the proven pattern and practice involved actions by supervisors at ten terminals in as many states.

[43] *E.g.*, Tr. 74-76; 103-04; 135-37; 218-20; 227-31; 236-49; 267-72; 965-73; 1037-39.

[44] By "senior management" Sprint evidently means only the President or CEO of a company. (Pet. Br. 32 n. 12.) Elsewhere petitioner dismisses as legally irrelevant statements of a discriminatory policy made by a company's general counsel, "managers," "senior staff," or "human resources official[s]." (Pet. Br. 26 n. 7.)

such extraordinary inculpatory evidence was present in *Teamsters* or required by *McDonnell Douglas*.

The prohibition against age discrimination contained in the ADEA is not limited to employers whose CEOs are so incredibly inept as to make openly biased statements (in front of individuals not loyal enough to keep them secret) and then leave an evidentiary trail connecting those remarks to particular employment decisions.[45] The touchstone of relevance under Rule 401 is whether a reasonable person who wanted to determine if discrimination had occurred might want to know the information in question. A reasonable trier of fact assuredly would want to know if there was evidence suggesting a pattern and/or practice of discrimination at Sprint, regardless of whether there was also evidence that the company's CEO had expressly and personally inspired the discrimination involved.

Petitioner suggests that the possible occurrence of some instances of age discrimination at Sprint is "hardly surprising" and thus that evidence of such discrimination is not probative. (Pet. Br. 36).[46]

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[45] *Riordan v. Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987)("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it.")

[46] In the district court petitioner argued that evidence from five witnesses (or indeed any witnesses) regarding other acts of discrimination would be impermissible under Rule 403 because it would consume too much time. In this Court, petitioner now reverses course and argues that the proffered evidence was

Certainly in employment, as in matters of state, it may be that "stuff happens" which is not indicative of any wider problem.[47] But whether in this or any other case the occurrence of some instances of age discrimination

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irrelevant under Rule 401 because plaintiff proposed to call *too few* witnesses regarding other acts of discrimination. (Pet. Br. 8, 33, 36).

Such new objections to admissibility cannot ordinarily be raised in the first instance on appeal. The Federal Rules of Evidence require that a district judge explain the reasons for any in limine order, in order to afford the party adversely affected an opportunity to adduce evidence that addresses the court's concerns. That opportunity is denied when a new ground is advanced on appeal for excluding disputed evidence.

Sprint's about face on how many other-supervisor witnesses plaintiff was required to call is understandable. When Sprint was arguing in December 2004 that 5 such witnesses were too many, over 2,000 of Mendelsohn's former co-employees were alleging a pattern or practice of discrimination permeated Sprint's 2001-03 layoffs. Had Sprint then claimed — as it does now — that more anecdotal witnesses were necessary to establish the relevance of their testimony, Mendelsohn could have summoned them from down the hall.

[47] The fact that a single Federal Express driver once got a speeding ticket would not tend to show that a different Federal Express driver was speeding at the time of a disputed accident; at some point in their lives many individuals may commit such an infraction. On the other hand, if an Enron official at one generating station was shown to have reduced output for the purpose of driving up the price of electricity, that would be unusual enough to be relevant evidence in a dispute regarding why output was cut by other officials at a different plant.

would merely be a "hardly surprising" event that surely occurs at any employer, or was the telltale sign of something more serious, would at least ordinarily be a matter for the jury to determine. Even in the absence of a pattern, even one or a few instances of other-supervisor discrimination could indicate the existence of a relevant informal practice of discrimination if those other instances of discrimination were sufficiently similar in time, location, and/or method to the circumstances of the named plaintiff.[48]

B. Rule 401 Permits Use of Evidence of A Culture or History of Discrimination

The district court erred in barring all evidence of a culture of discrimination at Sprint.[49] This Court has repeatedly recognized that evidence of a culture or atmosphere of discrimination can be significant in determining whether a particular action was taken with a discriminatory purpose. Actions taken by officials with no direct role in a disputed employment action can create, and indicate the existence of, a "discriminatory atmosphere in which individuals could

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[48] In *McDonnell Douglas*, for example, the Court held Green could support a claim that he had not been rehired because of his race by adducing evidence as to the company's "treatment of [Green] during his prior term of employment." 411 U.S. at 804.

[49] The court of appeals, in overturning the in limine order, held plaintiff was entitled to offer proof (including through the excluded witnesses) of an atmosphere of discrimination at Sprint. (Pet. App. 14a).

justify their bias." *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995). In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court noted that the conduct of prosecutors in a particular trial could be shaped by their awareness of "the culture of discrimination" in their office. 537 U.S. at 347. This Court has held that where there has been a history of discrimination, special preventative measures may be required to prevent the resulting discriminatory culture from shaping future actions. *Local 28 of Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 449 (1986).[50] Appellate decisions in eleven circuits have found that proof of the presence (or absence) of a culture or atmosphere of discrimination is important evidence in determining whether discrimination occurred in a particular case.[51]

This Court has recognized in a wide variety of circumstances the potential impact on human behavior that can follow from the culture or atmosphere of the environment in which an individual acts or works. *Ferri v. Ackerman*, 444 U.S. 153, 202-04 (1979)(adverse impact on government officials of "an atmosphere of intimidation" created by lawsuits); *Sheppard v. Maxwell*, 384 U.S. 333, 356 (1966)(defendant denied a fair trial because the proceedings occurred in the "atmosphere of a 'Roman Holiday'"); *American Ship Bldg., Co. v. NLRB*, 380

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[50] "[E]ven where the employer . . . formally ceases to engage in discrimination . . . . 'where a discriminatory atmosphere has been shown, the more common forms of relief may not be . . . adequate.' *Taylor v. Jones*, 653 F. 2d 1193, 1203 (8th Cir. 1981)."

[51] See Brief Appendix.

U.S. 300, 306 (1965)(violations of the NLRA created "an atmosphere in which the free opportunity for negotiation contemplated by [the NLRA] does not exist"); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)("the inherent pressures of the interrogation atmosphere"); *United States v. Enmons*, 410 U.S. 396, 410 n. 20 (1973)("the charged atmosphere attending a prolonged labor dispute" can lead to injury to persons or property).

In a wide range of circumstances, a tainted or permissive institutional culture has led to violations of federal law. *United States v. Martin*, 135 Fed. Appx. 411, 413 (11th Cir. 2005)(securities fraud)[52]; *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 291 (D. Mass. 1994)(mail fraud and shipment of adulterated medical supplies)[53]; *Ohio Public Employees Retirement System v. Fannie Mae*, 357 F. Supp. 2d 1027, 1030 n. 5 (S.D.Ohio 2005)(securities fraud)[54]; *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.

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[52] "Your Honor, you asked a question as to why someone like Mr. Martin would do something like this. I would suggest that part of the reason was the culture, the corporate culture, that existed at HealthSouth during that period of time."

[53] "This is a case in which a pervasive and powerful corporate culture exalted the value of profit above the value of human life."

[54] The Office of Federal Housing Enterprise Oversight concluded that Fannie Mae "maintained a corporate culture that emphasized stable earnings at the expense of accurate financial disclosures."

3d 437, 442 (D.C.Cir. 2004)(unfair labor practices)[55]; *United States v. Brodie*, 403 F. 3d 123, 155 (3d Cir. 2004)(Trading With The Enemy Act)[56]; *Carlson v. Xerox Corp.*, 392 F. Supp. 2d 267, 275 (D.Conn. 2005)(securities fraud)[57]; *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1035 (N.D.Cal. 2002)(federal Safe Drinking Water Act)[58]; *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549, 632 (S.D.Tex. 2002).

In the workplace context, the culture of an organization often plays a critical role in shaping the conduct and attitudes of officials and workers alike. The day-to-day activities of those employees, and the overall success of the employer, are not dictated solely, or perhaps even primarily, by the formalities written into manuals, memos and posted notices. The overall culture of the employer may play a far greater role in determining whether workers are hard working or

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[55] "[T]he Board found that anti-union conduct 'so pervasive as to have created a corporate culture of lawlessness.'"

[56] "The government evidence shows a corporate culture pervaded by the use of code words for Cuba . . . an overall corporate culture of deceit concerning transactions with Cuba."

[57] "[T]he reason behind the accounting problems was a 'corporate culture that cut bookkeeping corners to make up for deteriorating business fundamentals.'"

[58] "The seriousness, duration and willfulness of Defendant's non-compliance with legal requirements are evidence of a corporate culture . . . in which both regulations and regulators are seen as an inconvenience rather than a means of protecting the public."

lackadaisical, honest or corner-cutting, safety-conscious or careless, attentive to customers or indifferent. Subordinates glean the actual priorities, concerns, and interests of their superiors from the day-to-day signals apparent in the office or plant--from speeches or asides at meetings, jokes in the hall, the patterns of promotions, whether conduct that violates a particular rule leads to serious discipline or is simply ignored. The attitudes and values of a supervisor may also be shaped over time by those of his or her peers, in the same manner that attitudes and values spread in any other aspect of society.

For managers and academics alike, an understanding of the way in which corporate culture is created, and in turn shapes the behavior of workers and supervisors, is an essential part of corporate governance.[59] Business school courses routinely deal with the importance of corporate culture[60]; some twenty-two Harvard Business School faculty members list corporate culture as an area of professional specialty or interest.[61] For aspiring or established supervisors and managers, Amazon.com lists for sale more than twenty-five books about corporate culture.[62]

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[59] See Remarks by The President at The Corporate Responsibility Session, August 13, 2002, 2002 WL 1839143 *6-*7.

[60] See Brief Appendix.

[61] See http://pine.hbs.edu/external/areasInterestShow.do?KEY=KWD visited October 5, 2007.

[62] J. C. Miller, *Build A Winning Corporate Culture* (2004); S. M. Davis, *Managing Corporate Culture* (1990); F.C. Ashby, *Revitalize*

Sprint itself recognizes the practical importance of corporate culture. The company's website assures current and prospective employees that

> [f]rom respect for each other and dedication to the communities in which we live and work, we have managed to create a culture in which each employee has the opportunity to learn and grow, and contribute.[63]

> Our corporate culture looks to open doors and reward those whose talent carries them through.[64]

A Web posting soliciting job applicants asks, "Do you want to work for an organization that offers a professional culture and first-rate training?"[65] The Sprint website announces with pride that "As Sprint Nextel chairman and CEO, [Gary D.] Forsee has worked to establish a corporate culture of innovation

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Your Corporate Culture: Powerful Ways to Transform Your Company into a High-Performance Organization (1999); M. Williams, *Fit In! The Unofficial Guide to Corporate Culture* (2007).

[63] http://www.sprint.com/companyinfo/diversity/culture/ visited October 1, 2007.

[64] http://www.sprint.com/companyinfo/diversity/home.html visited October 1, 2007.

[65] http://www.sprintkioskcareers.com/ visited October 1, 2007.

and performance integrated with corporate social responsibility."[66]

Corporate culture can play an important role, for good or for ill, in shaping the attitudes of supervisors towards the types of discrimination forbidden by federal law. Biases against particular types of workers are not genetic, nor are they acquired solely, or perhaps even primarily, outside the job. Often such attitudes toward discrimination are shaped by on-the-job experiences, the actions, inaction and statements of an individual's superiors and peers. That is particularly likely in the case of age discrimination, which Congress concluded "rarely was based on the sort of animus motivating some other forms of discrimination, [but] was based in large part on stereotypes" about the competence and productivity of older workers. *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). A reasonable trier of fact, in determining whether a particular employment action was taken with a discriminatory purpose, could reasonably want to know if the supervisor who took that action had been exposed at that employer to a culture of discrimination; or, to an environment in which anti-discrimination principles were consistently enforced.

There will, rarely be *direct* evidence of the statements and actions that could create a culture of discrimination. *See Desert Palace v. Costa*, 539 U.S. 90, 100 (2003). Such attitude-shaping events will not

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[66] http://www2.sprint.com/mr/ex_dtl.do?id=100 visited October 1, 2007.

ordinarily be memorialized or preserved in a manner likely to be revealed by discovery. (See n. 45, supra). The meetings, telephone calls, and casual conversations through which an attitude of discrimination may spread among a group of supervisors are unlikely to be recorded or transcribed. Few managers today who want to encourage the use of layoffs to create a younger work force would be so rash as to put that in writing.

As is often true in discrimination cases, the trier of fact may need to rely on "circumstantial evidence of the corporate culture existing" when the disputed action occurred. *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 132 (3d Cir. 1997). A critical indicator of whether the culture in which one supervisor works encourages or tolerates discrimination is whether other supervisors, exposed to that same corporate culture, have themselves concluded that their common employer views discrimination with permissiveness or even favor. In *Miller-El v. Cockrell*, for example, this Court correctly attached weight to the fact that one supervisor had warned a subordinate that he would be fired if he permitted any African-Americans to serve on a jury. 537 U.S. 322, 334 (2003). There was no claim that either the supervisor or subordinate involved had played any role in the *Miller-El* trial, or had ever directed the particular prosecutors who handled that trial. But the supervisor who had issued that admonition obviously had concluded, from the general tenor and history of the office--information likely evident as well to all who worked there--that the deliberate exclusion of minority jurors was favored (or at least tolerated) by the highest officials in the office.

A supervisor who openly engages in discrimination certainly does not intend to forfeit his or her own job or career. Such brazen action would ordinarily occur only if the supervisor were quite confident, in light of the general attitudes and practices within the firm, that higher officials would not impose any sanctions if they were to learn that discrimination was occurring. Discriminatory action grounded on such experience-based confidence may well speak louder than the words of any witness. Of course a supervisor who engaged in such open discrimination might be mistaken about the attitudes of his superiors, or might merely be exceptionally foolhardy or hateful. But a trier of fact, in attempting to decide whether the environment at a workplace encouraged or tolerated discrimination, could certainly give weight to the fact--if it were the case--that one or more supervisors who actually worked there manifestly believed that they could engage in such discrimination without endangering their own position with that employer. If a supervisor is willing to bet his or her job on the proposition that the employer will tolerate discrimination, a jury could reasonably conclude that supervisor knew what he or she was doing, and could infer that other supervisors--including the supervisor who took the adverse action complained of--could have reached the same conclusion from similar experiences.

Not every act of other-supervisor discrimination would necessarily have this tell-tale quality. A biased supervisor might engage in discrimination, even though well aware that he could be fired for doing so, if the supervisor were confident that such discriminatory act would go undetected. It might be difficult to draw any conclusion about the culture at an

employer if a single discriminatory supervisor (like an embezzler) had taken significant precautions to assure that his discrimination would go undetected. But that is not what occurred in the instant case. One supervisor expressly instructed subordinates to engage in age discrimination, an action which strongly indicated that supervisor was confident age discrimination was a practice regarded by management as acceptable, if not desirable. Another supervisor frankly told a witness that she had received an adverse appraisal, shortly before she lost her job, because she was "too old" for her job. If presumably well informed Sprint officials in 2001-03 had concluded the company regarded age discrimination with favor or tolerance, and it was thus safe (or even desirable) to engage in such discrimination, a jury could reasonably infer Reddick might have come to the same conclusion.

A history of discrimination is probative for similar reasons. If company officials in the past engaged in discrimination, they likely did so only after concluding from the environment in the plant or office that such discrimination was then permissible. A reasonable trier of fact could conclude that the circumstances that led to that conclusion would have a continuing effect on others who had worked there at the time, or that the circumstances themselves might also continue. Indeed, the visible effects of past discriminatory practices could themselves be an important factor in convincing subsequent supervisors of the acceptability of discrimination. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)("prior acts" of discrimination can be relied on as "background evidence" to prove the existence of a discriminatory purpose).

A per se rule requiring exclusion of evidence of a culture or history of discrimination would significantly narrow the scope of the ADEA itself. The effect of the in limine order in this case was to require the plaintiff to show that Reddick bore some personal, idiosyncratic animus towards older workers which led him to discriminate against Mendelsohn. Counsel for the employer argued with considerable force that if Reddick really harbored such personal animosity it would have been manifested independently of the layoffs, that Reddick would, for example, have made derogatory remarks about older workers. (Tr. 1345). But the prohibition against intentional discrimination is not limited to actions taken with such animus. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 667-69 (1987) The ADEA[67] is also violated if a supervisor lays off older workers simply because that is what he thinks higher company officials, or even his peers, want him to do.[68] A supervisor who engages in

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[67] In enacting the ADEA, Congress relied heavily on a report from the Secretary of Labor that had been mandated by Title VII of the 1964 Civil Rights Act. That report concluded age discrimination in employment was widespread, but it was based on employers' stereotypes, not on any personal animus towards older workers. "We have found no evidence of prejudice based on dislike or intolerance of the older worker." *The Older American Worker: Age Discrimination in Employment, A Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964*, p. 6 (1965). *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 587 (2004); *EEOC v. Wyoming*, 460 U.S. 226, 231-32 (1983).

[68] Mendelsohn was only required to show that age was a motivating factor in the decision to lay her off. She was not

discrimination for those reasons would not have any personal history of discrimination or biased remarks. The in limine order, however, largely precluded Mendelsohn from offering evidence of such a motive, effectively placing beyond the scope of the statutory prohibition discrimination engaged in for reasons other than personal bias. Such a limitation would have the perverse effect of limiting the ADEA to instances of personal idiosyncratic discrimination, which are likely to injure only a small number of older workers, while effectively denying the protection of the law at employers where a culture of discrimination may lead to far more widespread discrimination.

C. Rule 401 Permits Use of Evidence of Other-Supervisor Discriminatory Statements

The blanket exclusionary order precluded introduction of evidence of age-biased remarks by any Sprint manager or official other than Reddick. But proof of biased remarks by one supervisor can be probative evidence of the corporate culture and attitudes potentially affecting all supervisors. The lower courts have repeatedly found such remarks, even if made by supervisors not directly involved in the disputed adverse action, to be evidence of a culture of discrimination and thus proof of "the influences behind the action taken with respect to the individual

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required also to prove that her "supervisors were personally prejudiced against h[er]." *McAlester v. United Airlines, Inc.*, 851 F. 2d 1249, 1260 (10th Cir. 1988).

plaintiff." *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 597-98 (1st Cir. 1987).[69]

A biased remark can be particularly telling evidence of the existence of a discriminatory atmosphere. A covert act of discrimination might not be indicative of a discriminatory culture; a biased official, although well aware that the employer would punish such behavior, may have engaged in discrimination in the belief that no one would realize that he or she had done so. But a biased remark by definition leaves a witness with personal knowledge of what has occurred. The possibility the discriminatory behavior will go undetected by higher officials is far smaller, and even that may rest largely on the chance, probative in itself, that the witness also does not believe those higher officials would want to know if a supervisor had made a discriminatory remark.

Here, Sprint supervisors assertedly asked "[C]an't we find someone who's younger [?]" and told a worker that she was receiving an adverse evaluation because she was "too old for the job." No supervisor would admonish a subordinate not to hire a drug-free applicant by objecting, "Can't we find a heroin user?" Nor would any supervisor tell a worker she had been

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[69] *E.g.*, *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F. 3d 11, 18-19 (1st Cir. 2007); *Asmo v. Keane, Inc.*, 471 F. 3d 588, 595 (6th Cir. 2006); *Cummings v. The Standard Register Co.*, 265 F. 3d 56, 63-64 (1st Cir. 2001); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F. 3d 344, 356 (6th Cir. 1998); *Robinson v. Runyon*, 149 F. 3d 507, 512-14 (6th Cir. 1998); *Walden v. Georgia-Pacific Corp.*, 126 F. 3d 506, 521-22 (3d Cir. 1997).

given a poor evaluation because, "You are too honest and unwilling to take bribes." In either case, the speaker would be quite sure such remarks would be reported and lead to serious disciplinary action. If the Sprint supervisors in question made the asserted age-biased statements, they must have concluded from the environment at Sprint that age discrimination, unlike drug use or corporate bribery, would not be regarded by higher officials as significant misconduct. The asserted remarks were particularly telling because they were made by Sprint officials with "authority to render personnel decisions." *Ryder v. Westinghouse Electric Corp.*, 128 F. 3d 128, 133 (3d Cir. 1997).

If ageist remarks were indeed made by Sprint officials, counsel for petitioner assures this Court that "Sprint condemns them." (Pet. Br. 31). But plaintiff was entitled in the district court to offer sworn testimony indicating that in 2001-03 Sprint's own supervisors had concluded, to the contrary, that the company actually did not object to, or necessarily disagree with, such biased statements. A reasonable jury could infer that Reddick and other supervisors who worked in the same environment might have reached a similar conclusion and have made lay off decisions in light of that corporate culture.

D. Rule 401 Permits Use of Other-Supervisor Evidence to Demonstrate Pretext

The blanket exclusionary order barred all use of other-supervisor evidence, thus precluding use of that evidence to demonstrate the pretextuality of Sprint's proffered explanation for the decision to lay off Mendelsohn. In overturning that order, the court of

appeals correctly held that other-supervisor evidence could be used where it "tends to discredit the employer's assertion of a legitimate motive." (Pet. App. 6a).[70]

In any employment discrimination case in which the plaintiff establishes a prima facie case, the employer is required to (and almost invariably does) offer some legitimate, non-discriminatory explanation for the disputed adverse action. The plaintiff can then seek to prove a violation of the law in a number of ways, including by showing that the proffered explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000). Other-supervisor evidence may be useful in assessing whether a proffered explanation is indeed pretextual. The proffered other-supervisor evidence in the instant case tended to demonstrate pretext, because the specific methods used to discriminate against the excluded witnesses were similar to the assertedly discriminatory manner in which Mendelsohn had been selected for layoff.

Before her dismissal, Mendelsohn had received uniformly high ratings on Sprint's regular "numeric" evaluations, which were disclosed to employees.[71] In

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[70] In determining whether a particular proffered explanation was pretextual, evidence of how other workers were treated by other supervisors may of course be exculpatory as well as inculpatory. *See Ansell v. Green Acres Contracting Co., Inc.*, 347 F. 3d 515, 521 (3d Cir. 2003).

[71] Tr. 463-504; Exs. 63-69.

late 2001, Sprint created a second set of secret evaluations, known as the "Alpha" or "shadow" ratings, which were not to be disclosed to workers. Although the Alpha "forced ranking" ratings were not supposed to be used in making RIF decisions, Mendelsohn--who had received a low Alpha rating--was laid off because of it.[72] Several of the excluded witnesses similarly would have testified that, despite histories of favorable ratings, the Alpha ratings also were improperly used to dismiss them.[73]

When Mendelsohn was terminated, she was told a "workforce reduction" was the reason.[74] In fact, her job duties were simply assigned to another, younger worker.[75] Several of the proffered witnesses would have testified they were given similar false pretextual explanations for their dismissal.[76]

Sprint's official "mandatory" "Displacement Guidelines" provided company-wide rules for RIF selections.[77] Reddick did not even know of the

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[72] Tr. 43-49, 978-81, 1020.

[73] Borel Dep. 40-42; John Hoopes Dep. 37; Bonnie Hoopes Dep. 50-51.

[74] Tr. 617-19; Ex. 58.

[75] Tr. 176; Ex. 4.

[76] Bonnie Hoopes Dep. 50-51, 58-59; John Hoopes Dep. 34-36; Borel Dep. 93-94.

[77] Ex. 17.

mandatory RIF policy. (Tr. 1159). A worker's length of service was to be considered in selecting employees to be laid off. Mendelsohn had far more seniority than the younger workers who were retained in her unit.[78] Several of the other alleged discrimination victims likewise would have testified they too had greater seniority than younger workers retained in their business units.[79]

There is more; but in short, because of the blanket exclusionary order, Sprint at trial was able to portray its treatment of Mendelsohn as an isolated case--a single assertedly less able worker being laid off because of her personal failings. Because the order effectively limited the evidence before the jury to the small unit in which Mendelsohn had worked, Sprint was able to argue that Mendelsohn "was the only person over 40 without a job because of this reduction in force." (Tr. 1364). In fact, there were many other persons "over 40 without a job" because of the RIF, and there was substantial evidence that they were the victims of age discrimination. The wholesale exclusion of that evidence deprived Mendelsohn of a "full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for [her layoff], the decision was in reality [age] premised." *McDonnell Douglas v. Green*, 411 U.S. 792, 805 n. 18.

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[78] Tr. 123-24, 208-09.

[79] Bonnie Hoopes Dep. 82-83; John Hoopes Dep. 25-29.

II. EVIDENCE IS ADMISSIBLE UNDER RULES 401 AND 402 IF A REASONABLE TRIER OF FACT COULD FIND IT HAS A TENDENCY TO MAKE A FACT OF CONSEQUENCE MORE OR LESS PROBABLE

In excluding the other-supervisor evidence in this case, the district judge made a second, more fundamental error. Faced with a serious dispute about the probativeness of the evidence, the trial judge assumed the evidence could not be admitted unless the judge personally found that evidence probative. In denying Mendelsohn's motion for a new trial, the judge explained that she herself was not convinced that other-supervisor evidence would make it "more likely that the decision makers in this case discriminated against plaintiff." (JA 436a).

Petitioner insists a jury should not be permitted to consider the possible probativeness of evidence unless the trial judge has first decided that he or she personally finds it is persuasive. The controlling question, according to petitioner, is whether "a district *court* . . . could find a link between" the proffered evidence and the disputed issues in a case. (P.Br. 32-33)(emphasis added). Only after the judge has found that there is such a link, petitioner contends, is the jury allowed to make its own determination of whether such a connection exists.

The Tenth Circuit correctly rejected this approach. The question before a trial judge, the court of appeals recognized, is not whether the judge personally found the disputed evidence to be persuasive, but only whether "a reasonable trier of fact" could so find. (Pet.

App. 14a). Invoking a metaphor widely used in the lower courts, the court of appeals held:

> [t]he evidence which Mendelsohn seeks to present, "is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow . . . ."

(Pet. App. 14a)(*quoting Greene v. Safeway Stores, Inc.*, 98 F. 3d 554, 561 (10th Cir. 1996)). Five other circuits, in a wide variety of civil and criminal cases, have used similar language in holding that the issue under Rule 401 is whether a "reasonable trier of fact" or a "reasonable jury" could find that the evidence in question had "any tendency" to make a disputed fact more or less probable.[80] The United States has repeatedly invoked this "reasonable jury" rule in defending the admission of evidence in criminal cases.[81]

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[80] *E.g., United States v. Ortiz*, 966 F. 2d 707, 713 (1st Cir. 1992)("reasonable jury"); *United States v. Iafelice*, 978 F. 2d 92, 97 (3d Cir. 1992)("reasonable jury"); *United States v. Cartwright*, 359 F. 3d 281, 290 (3d Cir. 2004)("reasonable jury"); *Walther v. Lone Star Gas Company*, 952 F. 2d 119, 124 (5th Cir. 1992)("reasonable jury"); *United States v. Duarte*, 950 F. 2d 1255, 1259 (7th Cir. 1992)("reasonable jury"); *Fisher v. Pharmacia & Upjohn*, 225 F. 3d 915, 922 (8th Cir. 2000)("reasonable trier of fact"); *Morgan v. Arkansas Gazette*, 897 F. 2d 945, 951 (8th Cir. 1990)("reasonable trier of fact").

[81] Brief for the United States, *United States v. Arias*, 238 F. 3d 1 (1st Cir. 2001), No. 99-1924 (1st. Cir.), 2000 WL 35570974 *24; Brief of Appellee, *United States v. Sekoumar*, 118 F. 3d 1579 (3d

The distinct roles of judges and juries in evaluating the probativeness of evidence is well established. For a judge,

> [t]he question to be asked in determining the relevance of evidence is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence.

2 *Weinstein's Federal Evidence* § 401.04[2][a], at 401-21.

> Determining relevancy involves "weighing" the proof only in the limited sense of determining that a reasonable person acting as trier could assign some weight to the evidence in deciding the point it is offered to prove.

1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:1 at 544 (3d ed. 2003). "The judge can only ask, could a reasonable juror believe that the [evidence] makes [a disputed fact] more probable than it would otherwise be . . . ?" J. Strong, *McCormick on Evidence*, 279.[82]

Cir. 1997), No. 96-5588 (3d Cir.), 1997 WL 33710247 *20; Brief for Appellee, *United States v. Yates*, 187 F. 3d 633 (4th Cir. 1999), Nos. 98-4644, 98-4726 (4th Cir.), 1999 WL 33722152 *17 n. 11.

[82] The disputed fact need not be the ultimate fact in question, as Sprint and the district court wrongly insist. See n. 31, supra.

Whether a particular item of evidence is probative will often be a central issue in a civil or criminal case. Trial counsel frequently contend that evidence relied on by the opposing party is worthless, that such evidence, in the terms of Rule 401, lacks "any tendency" to support the claim or defense of the other party. It is frequently the central purpose of the trial, and the key role of the trier of fact, to resolve such disputes. If filing a pretrial in limine motion under Rule 401 shifted the primary responsibility for resolving such common disputes to the district judge, trial by jury could easily be transformed into trial by in limine motion.

The more limited role of judges under Rule 401 reflects the constraints that apply to a judge in ruling on a post-trial motion for judgment as a matter of law, or on a pretrial motion for summary judgment. In determining either of those motions, the judge is required to look at the evidence in the light most favorable to the non-moving party, and to grant the motion only if no reasonable jury could return a verdict for the non-moving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149 (2000); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). If in the instant case the disputed evidence had been admitted, the jury had returned a verdict for the plaintiff, and Sprint had then filed a motion for judgment as a matter of law, the district judge would have been required to look at that evidence in the light most favorable to Mendelsohn, and to inquire only whether a reasonable jury could have relied on that other-supervisor evidence. So long as a reasonable jury could have done so, the judge could not grant such a motion for judgment as a matter of law simply

because she personally did not find the evidence persuasive. A judge cannot exercise a greater role in assessing evidence, when essentially the same dispute about the weight of evidence arises in the context of an in limine motion under Rule 401 of the Rules of Evidence — rather than a motion for summary judgment or judgement as a matter of law under Rules 50 and 56 of the Federal Rules of Civil Procedure.

The well-established limitations on the judge's role in evaluating the weight (or lack thereof) of evidence is an essential consequence of the constitutional, and in this case statutory[83], right to trial by jury. The right to a jury trial would mean little if the jury could only hear evidence which a trial judge had already found personally persuasive. In according claimants under the ADEA the right to a jury trial, Congress presumably concluded that juries were more familiar than judges with the realities of the modern day plant floor or office, and were best able to draw sound inferences about events occurring in those settings from the evidence that might be adduced at trial. *See Parklane Hosiery Co., Inc. v. Lane*, 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting)("Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.") A determination of the significance of evidence turns not only on the other evidence in the case, but also on "the trier's personal experience and knowledge." 2 *Weinstein's Federal Evidence*, § 401.04[2][b] at 401-22.3.

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[83] 29 U.S.C. § 626(c)(2).

> It is important for the judge to bear in mind that the experience of the jurors may be quite different from that of the judge and that consequently their perceptions of proffered evidence will vary. That is a natural consequence of our jury system. A judge may be doubtful about the probative force of certain evidence and yet admit it because the jury, in its rightful function, may perceive it differently than the judge does.

Id. § 401.03[2][b] at 401-9 to 401-10.

Evaluation of Sprint's objections to the use of other-supervisor evidence necessarily rests to a substantial degree on an understanding of the typical American workplace. Sprint argues that other-supervisor evidence is never probative because there is simply "no connection" between the actions and attitudes of two different supervisors who happen to work for the same employer. (Pet. Br. 9). That might indeed be the case if company supervisors in the United States were usually organized like sleeper terrorists, each carefully isolated from one another and out of contact for long periods of time with any higher authority. Somewhat more plausibly, there may be specific instances in which supervisors function with such great autonomy, and so little direction or oversight, that other-supervisor evidence might deserve little or even no weight. Juries are uniquely competent to understand in light of their own employment experiences whether the circumstances of a particular case might be of that sort.

Jurors are also able to assess the probativeness of disputed evidence in the context of all the evidence and issues in the entire trial, something which a trial judge cannot do in ruling on a pretrial in limine motion, and can attempt only to a limited degree in the midst of trial testimony. A trial judge cannot know when he or she rules on the admissibility of evidence what inferences may be drawn and what subsidiary issues might loom larger during the later course of jury deliberations. By requiring only that evidence provide information which a reasonable jury could conclude has some tendency to prove or disprove a relevant fact, the law makes due allowance for the unavoidable limitations on the ability of a trial judge to determine with confidence whether that evidence might ultimately be of significance to the trier of fact.

This is not to suggest that the concerns raised by Sprint regarding the probativeness of other-supervisor evidence are necessarily groundless or made in bad faith. There will doubtless be cases where more specific objections to particular items of other supervisor evidence, or even general arguments questioning the value of such evidence, might be quite persuasive. There may be cases in which the events involving other supervisors were so far removed in location or time that no reasonable trier of fact could find them relevant.[84] But *Mendelsohn* is not such a

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[84] *See, e.g., Schrand v. Federal Pacific Electric Co.*, 851 F. 2d 152, 155-56 (6th Cir. 1988)(barring, in dispute over dismissal in Ohio, testimony regarding alleged discriminatory dismissals in New Jersey and New Mexico, "places far from the plaintiff's place of employment.")

case. So long as a reasonable jury could conclude that disputed other-supervisor evidence has any tendency to support a finding of discriminatory purpose, those objections and arguments must be made to the trier of fact, and cannot constitute a basis for excluding the evidence under Rules 401 and 402.

III. RULE 403 NEITHER REQUIRES, NOR INVARIABLY PERMITS, THE EXCLUSION OF OTHER SUPERVISOR EVIDENCE

Other-supervisor evidence is not, as Sprint suggests, invariably subject to exclusion under Rule 403. Nor did the Tenth Circuit hold, as Sprint insists, that "it never may be excluded." (Pet. Br. 39).

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Because the factfinding process is imperiled by the exclusion of relevant evidence under Rule 403, courts "must take special care to use it sparingly." 2 *Weinstein's Federal Evidence* §403.02[2][a] at 403-11.

> This approach is sensible because in the search for truth much if not most probative evidence could be misused, appeal to emotions, or confuse the factfinder, and attempts to purify trials by filtering out proof that raises modest risks

would likely lead to uninformed and unreliable verdicts.

1 C. Mueller and L. Kirkpatrick, *Federal Evidence*, § 4:12 at 637. Rule 403 "tilts in favor of admissibility." *Mattenson v. Baxter Healthcare Corp.*, 438 F. 3d 763, 771 (7th Cir. 2006). In determining whether to exclude evidence under Rule 403, courts should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Weinstein's Evidence* ¶ 403(3) (1975).

The terms of Rule 403 embody three distinct requirements. First, because any excluded evidence must be "substantially outweigh[ed]" by one of the Rule 403 factors, exclusion under Rule 403 will at least usually be limited to evidence that "has only marginal probative value." (U.S.Br. 24). Second, even where that is the case, the value of that evidence will only be "substantially outweigh[ed]" if the countervailing problem regarding one or more of the Rule 403 factors is demonstrably clear and serious. Third, evidence cannot be excluded under Rule 403 if the potential problems could be significantly reduced "by way of contemporaneous instructions to the jury followed by additional admonitions in the charge," 2 *Weinstein's Federal Evidence* § 403.02[2][c] at 403-16[85], or in some other manner.

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[85] "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." Rule 403, Committee Note. Also see *Huddleston*, supra, 485 U.S. at 691-92.

Manifestly not all (or necessarily any) of these three requirements will invariably be satisfied in every case involving other-supervisor evidence. Other-supervisor evidence is not invariably of marginal probativeness. To the contrary, as the United States correctly observes, in some cases a reasonable trier of fact could find such evidence of decisive importance. (U.S.Br. 11, 23). "[S]uch evidence 'may be critical to the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.'" *Walden v. Georgia-Pacific Corp.*, 126 F. 3d 506, 521 (3d Cir. 1997)(atmosphere of discrimination)(*quoting Antol v. Perry*, 82 F. 3d 1291, 1302 (3d Cir. 1996)).

Petitioner asserts that consideration of evidence of specific instances of other-supervisor discrimination would invariably cause enormous delays. If the five disputed witnesses had been permitted to testify in the instant case, petitioner now asserts, the case "surely would have become a four-, five- or six-*week* trial." (Pet. 15)(emphasis in original). That is demonstrably incorrect. Below, after the Tenth Circuit overturned the disputed in limine order, Sprint's counsel on remand advised the district court Sprint had decided not to call any additional witnesses to rebut the disputed testimony, and did not dispute plaintiff's suggestion that hearing plaintiff's witnesses would in fact require (at most) only two additional days of trial.[86] At the first trial, Sprint also had decided (even before knowing the result of its in limine motion) not to call any witnesses to respond to the other-supervisor

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[86] JA 442a-445a.

testimony.[87] Petitioner's brief in this Court identifies a number of cases wherein the trial court admitted testimony about individual instances of other-supervisor discrimination. The average total length of those trials was less than seven days.[88]

Sprint argues that juries would necessarily become hopelessly confused if required to resolve whether any Sprint employee other than Mendelsohn had been the victim of discrimination. (P. Br. 41-42). But trials involving separate claims by two or more individuals have long been commonplace in American jurisprudence. Far from being frowned on by the Federal Rules, such proceedings are expressly contemplated by the joinder provisions of Rule 20 of the Federal Rules of Civil Procedure. "[J]oinder of . . . parties . . . is strongly encouraged." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). If a single complaint had been filed by six plaintiffs--Mendelsohn and the five excluded witnesses--it would simply have been a run-of-the-mill civil action involving six named plaintiffs. Civil actions involving joinder of claims of

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[87] JA 234a-248a.

[88] *Martin v. Citibank, N.A.*, 762 F. 2d 212, 215 (2d Cir. 1985)(3 days); *Wyvill v. United Companies Life Insurance Co.*, 212 F. 3d 296, 300 (5th Cir. 2000)(6 days); *Schrand v. Federal Pacific Electric Co.*, 851 F. 2d 152 (6th Cir. 1988)(5 days)(Appellant's Opening Brief, 1987 WL 882351 *1); *Haskell v. Kaman Corp.*, 743 F. 2d 113 (2d Cir. 1984)(10 days)(Docket Entries, No. 78-684 (D.Conn.), pp. 6-7); *Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa. 1980)(6 days).

multiple parties, in some instances significantly more than six, are routinely tried in federal and state court.

Finally, Sprint argues that it would always be highly prejudicial if a jury learned about any incident of alleged discrimination other than the single decision to lay off Mendelsohn. According to petitioner, such a jury would likely be so incensed by that disclosure that it would then punish the employer by finding, regardless of the evidence, that the named plaintiff was laid off because of her age. This argument proves far too much; it would be equally applicable to a case in which two plaintiffs were included in the same complaint, in which a single plaintiff included two different claims (e.g. involving two different supervisors) in her complaint, or in which a single plaintiff with a single claim wanted to call a *same*-supervisor witness. Here, as in a case involving multiple ADEA plaintiffs, there is no reason to doubt the ability or willingness of a properly instructed jury to deal separately, and fairly, with each set of facts. [89] Juries in multi-plaintiff discrimination claims routinely reject the claims of some plaintiffs while accepting the claims of others.

Congress enacted the ADEA, Title VII, and other similar statutes because it regarded the eradication of discrimination in employment as goal of great national importance. But that does not mean that a witness' claim of discrimination is so incredibly inflammatory as to carry with it an intolerable risk of the unfair

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[89] *See Arlio v. Lively*, 392 F. Supp. 2d 317, 324 (D.Conn. 2005)(quoting limiting jury instruction).

prejudice to which Rule 403 is addressed. The very subject matter of an ADEA claim is age discrimination; such a claim could not be fairly presented if evidence of age discrimination itself is treated as unfairly prejudicial under Rule 403.[90]

> A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan v. Kempiners, 831 F. 2d 690, 698 (7th Cir. 1987)(Posner, J.).

IV. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER'S IN LIMINE MOTION SHOULD HAVE BEEN DENIED

The sole issue raised by Sprint's motion and the blanket exclusionary order was whether *all* other-supervisor evidence must invariably be excluded in a discrimination case. The only objection raised by that motion was that any testimony about officials other than Reddick was inadmissible per se. Petitioner did not advance any more specific objection to any particular aspect of the possible testimony of Mendelsohn's witnesses.

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[90] *See Robinson v. Runyon*, 149 F. 3d 507,515 (6th Cir. 1998)("It is axiomatic that the available evidence provided to establish racial animus may be racially inflammatory.")

In the Tenth Circuit, petitioner again advanced this per se objection to all other-supervisor evidence. Faced only with the single per se argument that had been made below, the court of appeals rejected that contention and--having disposed of the only objection to the testimony that Sprint was making--merely said the witnesses "should have been allowed to take the stand." (Pet. App. 13a). As a precaution, the court of appeals took the additional step (never requested by Sprint) of emphasizing that the court on remand could consider whether some testimony should be excluded on grounds Sprint as of yet had not raised.[91]

The United States, although agreeing the requested per se order was improper, argues the court of appeals should sua sponte have instructed the district court to proceed to evaluate each aspect of "the particular testimony that respondent's proffered witnesses would have given" (U.S. Br. 27) in light of the "other evidence in the case or appropriate trial considerations." (U.S.Br. 29). Such further proceedings, the government argues, would be appropriate to fully address "the issue of admissibility." (U.S. Br. 26).

But the question before the court of appeals was not "the issue of admissibility"; the question, rather, was only whether the specific motion that had been

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[91] Pet. App. 15a (reserving the discretion of the district court on remand to issue "ruling[s] regarding the proper use and limitations of such testimony"), 16a n. 6 ("Nothing in our ruling is intended to limit the district court's discretion during trial to issue limiting instructions or rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced.")

filed by Sprint should have been granted. The filing of an in limine motion for a blanket exclusionary order does not confer on the courts a roving commission, or responsibility, to address any and all imaginable "issues of admissibility." In the courts below, Sprint itself never proffered any more specific objections to "particular testimony." The court of appeals was not obligated to address, or to remand for district court consideration of, arguments that Sprint itself had never made and might yet choose not to make.

If this case were remanded as suggested by the government, the district court simply would not have before it any motion or relevant arguments on which it could rule. Rather, that court would have to request Sprint to file — for the first time — a testimony-specific set of objections. Whatever objections Sprint might file (if any) would in reality constitute an entirely new type of motion. It is not certain that Sprint would choose to make more particularized objections.

If the disputed evidence had been admitted (and the jury had ruled for the plaintiff), and in the proceedings below Sprint had advanced only the per se arguments that it in fact raised, the Tenth Circuit's rejection of that per se rule would have been the end of the matter. Petitioner would not have been entitled to a remand in which it could file a new post-trial motion attacking the admission of that evidence (and the subsequent jury verdict) on some new ground which it had failed to raise before or during trial.

In the actual procedural posture of this case, however, the court of appeals has ordered a new trial.

In the course of any such trial, Sprint will be free to advance with regard to particular aspects of the proposed testimony more specific objections under Rules 401 or 403. The decision of the Tenth Circuit accords the district court appropriate discretion to deal with such more particularized arguments when and if Sprint decides to make them.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

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APPENDIX

APPENDIX A

CIRCUIT COURT DECISIONS REGARDING DISCRIMINATORY CULTURE OR ATMOSPHERE

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Antol v. Perry, 82 F. 3d 1291, 1301-02 (3d Cir. 1996)

Asmo v. Keane, Inc., 471 F. 3d 588, 595 (6th Cir. 2006)

Brennan v. GTE Government Systems Corp., 150 F. 3d 21, 28 (1st Cir. 1998)

Brewer v. Quaker State Oil Refining Corp., 72 F. 3d 326, 333 (3rd Cir. 1995)

Carey v. Mt. Desert Island Hospital, 156 F. 3d 31, 37 (1st Cir. 1998)

Conway v. Electro Switch Corp., 825 F. 2d 593, 597-98 (1st Cir. 1987)

Cummings v. Standard Register Co., 265 F. 3d 56, 63-64 (1st Cir. 2001)

Ercegovich v. Goodyear Tire & Rubber Co., 154 F. 3d 344, 355-56 (6th Cir. 1998)

Holsey v. Armour & Co., 743 F. 2d 199, 208 (4th Cir. 1984)

Josey v. John R. Hollingsworth Corp., 996 F. 2d 632, 641 (3d Cir. 1993)

Koster v. Trans World Airlines, Inc., 181 F. 3d 24, 34 (1st Cir. 1999)

Mandell v. County of Suffolk, 316 F. 3d 368, 378 (2d Cir. 2003)

Margolis v. Tektronix, Inc., 44 Fed. Appx. 138, 141 (9th Cir. 2002)

Mattenson v. Baxter Healthcare Corp., 438 F. 3d 763, 770 (7th Cir. 2006)

McNulty v. Citadel Broadcasting Co., 58 Fed. Appx. 556, 561-62 (3d Cir. 2003)

Parrish v. Immanuel Medical Center, 92 F.3d 727, 733 (8th Cir. 1996)

Pitre v. Western Elec. Co., Inc., 843 F. 2d 1262, 1267 (10th Cir. 1988)

Polanco v. City of Austin, Texas, 78 F. 3d 968, 980 (5th Cir. 1996)

Ratliff v. Governor's Highway Safety Program, 791 F. 2d 394, 402 (5th Cir. 1986)

Robinson v. Runyon, 149 F. 3d 507, 512-14 (6th Cir. 1998)

Ross v. Rhodes Furniture, Inc., 146 F. 3d 1286, 1291 (11th Cir. 1998)

Ryder v. Westinghouse Electric Corp., 128 F. 3d 128, 132 (3d Cir. 1997)

Ryther v. KARE 11, 108 F. 3d 832, 842 (8th Cir. 1997)(en banc)

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55-56 (1st Cir. 2000)

Slattery v. Swiss Reinsurance America Corp., 248 F. 3d 87, 92-93 (2d Cir. 2001)

Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106, 113 (1st Cir. 1979)

Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F. 3d 11, 18-19 (1st Cir. 2007)

Walden v. Georgia-Pacific, 126 F. 3d 506, 521-22 (3d Cir. 1997)

Warren v. Halstead Industries, Inc., 802 F. 2d 746, 753 (4th Cir. 1986)

Woodson v. Scott Paper Co., 109 F. 3d 913, 922 (3d Cir. 1997)

APPENDIX B

BUSINESS SCHOOL COURSE DESCRIPTIONS REFERRING TO CORPORATE OR ORGANIZATIONAL CULTURE

Carnegie Mellon Tepper School of Business: "Groups and Teams in Organizations"
http://public.tepper.cmu.edu/workingschedule/prospectivestudentworkingschedule.aspx

Emory University: "Leading People and Organizations"
http://www.goizueta.emory.edu/degree/fulltimemba/popups/Leading_People_and_Organizations.html

Harvard Business School: "Leadership and Organizational Behavior"
http://www.hbs.edu/mba/academics/term1.html

MIT Sloan School of Management: "Organizational Studies"
http://mitsloan.mit.edu/academic/courses/15.341.php

Northwestern University: "Leadership in Organizations"
http://www20.kellogg.northwestern.edu/dpco/offdtl.asp?course_id=MORS-430-0

Tuck School of Business, Dartmouth: "Organizational Culture and Culture Change"
http://oracle-www.dartmouth.edu/dart/groucho/tuck_mba_program.syllabus?p_id=OC

University of Michigan Ross School of Business: "Seminar in Organization Studies"
http://www.bus.umich.edu/CourseManagement/ViewCourseDescriptions.asp?Term=F07&Division=MO&Program=0

University of North Carolina Chapel Hill: "Leading Organizational Change"
http://www.kenan-flagler.unc.edu/Programs/MBA/Academics/electives.cfm

University of Southern California: "Behavior and Organizations"
http://www.usc.edu/dept/publications/cat2007/private/pdf/business.pdf (p. 47)

University of Washington: "Creating Effective Organizations"
http://bschool.washington.edu/emba/courses.shtml

Wharton School of Business: "Ethics and Responsibility" (Class 6)
http://www.aacsb.edu/resource_centers/EthicsEdu/Syllabi/lgst652010.pdf

Yale School of Management: "Organizational Perspectives (Employee)"
http://mba.yale.edu/MBA/curriculum/core/index.shtml

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Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 686 (4th ed. 2007) 15

21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 2d § 5040 (2d ed. 2005) 2

Mendelsohn and her *amici* mischaracterize what the district court held, and indeed what this case is about. From these mischaracterizations flow their dire, but groundless, predictions about the effects of this case on deserving plaintiffs' ability to prove discrimination.

I. THE DISPUTED WITNESSES' TESTIMONY WAS IRRELEVANT

A. Mendelsohn Overlooks Both The *Burden* Of Proof, And The *Offer* Of Proof.

A threshold mischaracterization is what the district court held. There was no "blanket exclusionary order" or "per se rule of exclusion," as Mendelsohn and her *amici* repeatedly recite. The district court ruled *in limine*, but not *in the abstract*. At issue is what was in — and palpably absent from — Mendelsohn's response to Sprint's motion *in limine* and her offer of proof. If Mendelsohn thought that a logical nexus could be drawn between the disputed witnesses (and their decisionmakers) and herself (and her own, different decisionmaker(s)), the offer of proof was the place for her to articulate that nexus. She did not.

1. Mendelsohn overlooks the burden of proof.

The proponent of any evidence must lay a foundation for it. Where the relevance of one piece of evidence turns on the admission of another, Federal Rule of Evidence 104(b) requires the proponent to perfect the foundation for admission. The same rule applies where an offer of proof is at issue. "[A]n offer of proof must not only

include the evidence sought to be admitted but also any foundational evidence necessary to make the evidence admissible .... [T]he offer of proof must include evidence needed to prove any preliminary questions of fact required to make the evidence admissible under Rule 104." 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 2d § 5040, at 886 (2d ed. 2005).

Here Mendelsohn had a full and fair opportunity, following discovery, to lay a foundation of relevance, by showing that any possible bias of other supervisor(s) somehow had a nexus to Mendelsohn's own decisionmaker(s). As shown below, Mendelsohn's proffer was deficient.

2. Mendelsohn overlooks the deficiencies in her offer of proof.

Mendelsohn and her *amici* overlook the substantive omissions from Mendelsohn's written offer of proof (J.A. 342a-351a).

Federal Rule of Evidence 103(a)(2) provides that the party aggrieved by an evidentiary ruling must "ma[k]e known to the court by offer [of proof]" "the substance of the evidence [offered and excluded]." The proponent of evidence "'must express[] precisely the substance of the excluded evidence' to inform both the trial court and the appellate court why exclusion of the evidence was prejudicial error." *Polack v. Comm'r*, 366 F.3d 608, 612 (8th Cir. 2004) (citation omitted; alteration in original). Thus, we take her proffer as her best effort at

articulating what the disputed witnesses would say, and why that material is potentially relevant. *See, e.g., Cal. Gas Producers Ass'n v. Fed. Power Comm'n*, 383 F.2d 645, 651 (9th Cir. 1967) (affirming trial court's exclusion of proffered evidence; "The time and place to [make the requisite evidentiary showing was] in the offer of proof .... Unless an offer of proof is complete enough to show that it was error to reject the proof, the offer is insufficient."); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1409 (10th Cir. 1991) (a trial court need not reexamine an earlier evidentiary ruling even if the significance of the excluded evidence later becomes apparent; requiring "some contemporaneity" between the offer of proof and the evidentiary ruling ensures "a proper decision *at the time* the evidence is offered" and "create[s] a clear record for [the appellate court] to review the trial court's decision") (emphasis in original).

Mendelsohn's own brief reveals the shortcomings in her proffer. Almost none of the "evidence" Mendelsohn now cites at pages 4-6 of her brief is in the offer of proof, and much of it is not contained anywhere in the trial court record at all. For example, most of what Mendelsohn claims at page 5 of her brief is nowhere in the record. Her appeal thus contends that the district court should be reversed based on a set of (alleged) facts that she withheld.

But even if the "evidence" she proffers belatedly were to be considered, the same result follows. We see facially defective quasi-statistics,[1] conclusory

[1] *E.g.*, "Mr. Hoopes noticed that 'the vast majority' of the former Sprint employees who attended Right Management (Cont'd)

assertions,[2] other claims bereft of foundation,[3] opinions based on limited personal experience,[4] and gripes about performance standards that are not discriminatory at all.[5]

(Cont'd)
[outplacement meetings] were over the age of 40." (Mendelsohn Br. 4 & n.6.) *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), exposes the fallacy in that contention. Without proof of the population from which the layoffs occurred, no inference of discrimination arises. *Id.* at 650 ("The proper comparison [is] between the . . . composition of [the at-issue jobs] and the . . . composition of the qualified . . . population in the relevant labor market.") (citations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, S. 1745, 105 Stat. 1071 (1991). In addition, the "statistic" Mr. Hoopes would testify about is not probative because it does not measure the incidence of the layoffs, only the composition of those who voluntarily chose to use the services of the outplacement center. *See id.* at 651-52 (individuals' voluntary choices, not discrimination, may account for what might seem to be statistical disparities).

[2] *E.g.*, "It was pretty much a general understanding . . . ." (Mendelsohn Br. 5.)

[3] *E.g.*, "[There was] a set of expectations of how people are to operate . . . ." (Mendelsohn Br. 5.)

[4] *E.g.*, "[B]ased on the people that I know that have been RIF'd . . . ." (Mendelsohn Br. 4.)

[5] *E.g.*, "[T]hose who couldn't or wouldn't keep up would be gone . . . ." (Mendelsohn Br. 5.)

Mendelsohn's offer of proof comprises assaults by, and on, persons who were not alleged ever to have spoken with, or even known, Mendelsohn's decisionmaker(s):

Bonnie Hoopes would have contended that her duties were absorbed by three somewhat-younger employees. She heard one or more persons mention that she was the oldest, or most senior, employee in her work group. Ms. Hoopes would have testified that she heard her own former supervisor, Sharon Vorhies, make two discriminatory remarks. (J.A. 343a-344a.)

If such remarks were made, Sprint condemns them. But none of this had anything to do with Mendelsohn. As Sprint pointed out to the district court in response (J.A. 353a-354a), Ms. Hoopes' supervisor was someone named Chrystal Cone, who reported to Allen Winters, who in turn reported to Tony Castanon. Ms. Hoopes did not work in the Business Development Strategy group, and she did not report to anyone in (and indeed never had worked within) the Fee-Reddick-Blessing chain of command. Ms. Hoopes admitted that she knew nothing of Mendelsohn's employment (other than hearing Mendelsohn's admission that she had received unfavorable performance feedback, J.A. 377a). Mendelsohn never contended that Vorhies, who supposedly had made discriminatory remarks, had anything to do with Mendelsohn's own layoff, or that Vorhies interacted with Fee, Reddick or Blessing.

Yvonne Wood would have claimed that she believed that Sprint's "Staff Associate Program," involving "intern[s]," effectuated age discrimination. (J.A. 344a-

345a.) Wood also would have testified that she saw a spreadsheet from a supervisor named Dan Kennedy noting the ages of certain employees, and that (based on hearsay) she understands that someone named Ted Stock once had made a discriminatory remark.

None of this had anything to do with Mendelsohn. Wood did not work in the Business Development Strategy group. She reported to Roberta King, who reported to Stock, who reported to Mike Miller, who reported to Jerry Batt. There was no nexus to the Fee-Reddick-Blessing chain of command that supervised Mendelsohn. In particular, Kennedy (the supervisor who supposedly had the spreadsheet) and Stock (who supposedly made the discriminatory remark) had nothing to do with Mendelsohn's work or layoff, and Mendelsohn never alleged that the presence of interns had any bearing on her own layoff.

Sharon Miller reported to Noel Strong, who in turn reported to Stock. (J.A. 355a.) Miller would have testified that Stock made several age-derogatory comments. (J.A. 346a.) If true that is deplorable, but it also is wholly irrelevant to Mendelsohn. Neither Miller nor Stock had any relationship to Fee, Reddick, Blessing, or anyone else in the Business Development Strategy group. (J.A. 354a-355a.)

John Borel would have alleged that a younger female handled some of his former duties after Borel was laid off. Borel also would have testified that his supervisor, Janet Mathus, once told him that her own supervisor, Mohammad Hussain, had instructed Mathus to give

Borel an adverse performance rating. Finally, Borel would have alleged that he heard that an older worker, Carol Kippes, claimed discrimination based on age. (J.A. 347a.)

None of this had anything to do with Mendelsohn. None of the supervisors or managers he mentioned — not Cole, not Mathus, not Hussain — worked in the Business Development Strategy group. There is no allegation that Cole, Mathus, or Hussain played any role in any decision involving Mendelsohn, and their supervisory chains of command bore no relationship to Mendelsohn's. Borel reported to Mathus, then up to Hussain, then to someone that the record identifies only as "Mihwa," who in turn reported to a Dennis Huber. Borel, like the others, simply worked in a different part of the vast Sprint world.

John Hoopes, who reported to Terri Reynolds, would have testified that a younger, female manager assumed some of his duties. (J.A. 348a.) Mr. Hoopes would have testified that he noticed that others receiving outplacement assistance from Right Management also were older than 40. (J.A. 348a-349a.) Finally, Mr. Hoopes also would have recalled that, once, an (unnamed) employee in an (undescribed) function called "UMV" asked Mr. Hoopes why he was hiring someone 48 years old for a particular job. (J.A. 125a, 348a.)

None of this has anything to do with Mendelsohn. Mr. Hoopes' supervisor, Reynolds, had no nexus to Fee, Reddick, or Blessing. There is no allegation that

Reynolds or anyone else Mr. Hoopes mentioned had anything to do with Mendelsohn's layoff.

While Sprint can (and must) take the offer of proof to be true for present purposes, this Court can (and must) hold Mendelsohn to the deficiencies in it. Perhaps one or more of the five disputed witnesses had enough evidence to raise a triable question of discrimination as to himself or herself. Mendelsohn never alleged in her proffer anything suggesting a nexus to Mendelsohn's decisionmaker(s) or Mendelsohn's layoff.

3. None of the circumstances in which other-supervisor evidence is admissible exist here.

Of course there are cases in which a witness (though working for a different supervisor) nevertheless can shed light on the discriminatory motivations of plaintiff's decisionmaker — or the discriminatory motivations of someone else, that were *imposed on* plaintiff's decisionmaker. Admissible evidence involving other supervisors might include statements like:

- "I was instructed by top management to bring the average age down."

- "Human Resources told me that, in making layoff decisions, to resolve close cases in favor of the employee with the least seniority."

Evidence like this of course is potentially relevant. A reasonable jury perhaps could infer that the decisions

of plaintiff's own decisionmaker may have been tainted by similar instructions. Such evidence is potentially relevant because it suggests discriminatory intent by the *effective* decisionmaker ("top management" and "Human Resources," respectively) imposed on the *nominal* decisionmaker. Such evidence could be relevant whether or not the testifying witness was subject to an adverse employment action. The witness' testimony has relevance, not because he or she was laid off, but because he or she has something relevant to say about the motivations of (or those imposed upon) the plaintiff's decisionmaker.

Such a witness, however, is not the kind of "me, too" witness now at issue. Here we simply have nonparties who wish to tell their personal stories. Such evidence is not admissible unless it sheds light on the motivations of the plaintiff's decisionmaker. Sprint is not contending that evidence involving "other supervisors" is inherently irrelevant. Sprint is contending that evidence involving others is irrelevant *absent a foundational showing of nexus to plaintiff's decisionmaker.*

Consider a hypothetical case in which plaintiff, an employee in the U.S. Department of Labor's Wage and Hour Division, alleges that she was denied a promotion based on gender. She seeks to call as a witness another aggrieved female who worked in DOL's Office of Federal Contract Compliance Programs, another who worked in the DOL's Mine Safety Division, and two others, who worked at the Equal Employment Opportunity Commission and National Labor Relations Board, respectively. All propose to testify that they, too, believe

that they were discriminated against in promotions based on gender. All earn a paycheck from the United States government, just as the disputed witnesses here all earned a paycheck from Sprint. But there is no more nexus between the proffered witnesses and the plaintiff in that hypothetical than there was between Mendelsohn's proffered witnesses and Mendelsohn herself. In both cases there is no contention of a common decisionmaker; in both cases there is no foundational proof of any common scheme or plan. The witnesses may (or may not) have plausible discrimination claims of their own. But they have nothing relevant to say about the merits of the *plaintiff's* claims.

B. Mendelsohn's Cited Authorities Reinforce Rather Than Undermine The Principle That Nexus To A Decisionmaker Must Be Shown.

The cases Mendelsohn and her *amici* rely upon are inapposite. In each of them foundation — nexus to the decisionmaker — existed. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), a jury-selection case, the petitioner produced relevant evidence to support his claim of discrimination, including statistics showing a pattern or practice of discrimination by the District Attorney's office as a whole. *Id.* at 334-35. This Court found the evidence relevant because a foundation for it had been laid: statistical evidence (not mere anecdotes), showing a widespread pattern or practice, reinforced by proof of formal training about the importance of excluding minorities from juries and the techniques for doing so. *Id.* at 334-35, 347. No comparable foundation was laid here.

Ryder v. Westinghouse Electric Corp., 128 F.3d 128 (3d Cir. 1997), and *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003), similarly are inapposite. Those cases involved potentially relevant evidence concerning the views of top management that may have influenced the nominal decisionmakers. In *Ryder*, at issue was the "Chairman's Initiative Memorandum" authored by the CEO and containing ageist comments by the CEO himself and managers speaking for him. 128 F.3d at 131-33. The evidence was relevant because it directly demonstrated possible animus by upper management, imposed on decisionmakers. Similarly, in *Palasota*, the district court erred in excluding alleged age-related remarks by the company's President (Bracken) and National Sales Manager (Burks). The comments were relevant, "even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision. Bracken and Burks, both members of upper management, were in such a position." 342 F.3d at 578 (citation omitted).

Mendelsohn miscites Judge Posner's opinion in *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987), to the effect that evidentiary rulings should not "keep out probative evidence." The key word there was "probative." *Riordan*, a pay discrimination case under the Equal Pay Act and 42 U.S.C. Section 1983, held that the district court erred in excluding proffered statistical and anecdotal evidence of pay disparities between male and female employees — in effect denying plaintiff the opportunity to lay a proper foundation of nexus. *Id.* The Seventh Circuit correctly held that such evidence could be relevant upon a sufficient showing of proof

demonstrating a nexus with the plaintiff's supervisor, Randolph: "If it turned out that Randolph always recommended higher pay for men than women, this would be *some* evidence that Riordan hadn't gotten the raise she wanted because she was a woman." *Id.* (emphasis in original). *Riordan*, in sum, was a case in which the district court erroneously declined to consider the possibility of a foundation of nexus, even though the proffered evidence directly pertained to plaintiff's decisionmaker. The instant case, by contrast, is one in which Mendelsohn through her offer of proof revealed that she could not lay a similar — or any — foundation.[6]

C. There Was No Proof Of A Pattern Of Discrimination.

Mendelsohn now claims that there was a pattern of discrimination, but her "pattern" is just a few anecdotes. The way to demonstrate a pattern of discrimination, suggestive of a practice, is statistics. *Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("[B]ecause it alleged a systemwide pattern or practice [of discrimination], the

[6] *Amicus* AARP's reliance on a racial harassment case, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), is similarly misplaced. The court in *Hunter* merely eschewed a "flat rule" excluding all evidence of other acts under Rule 403. *Id.* at 1423. The Seventh Circuit upheld the admission of evidence of alleged harassment by other African-American workers. A hostile work environment harassment case like that one — in which the injury is the environment and the defendant's liability turns on its knowledge and remedial actions — differs from a disparate treatment case such as this, in which the injury is an adverse employment action and the defendant's liability turns on the intent of the identifiable decisionmaker(s).

Government ultimately had to prove more than the mere occurrence of isolated or . . . sporadic discriminatory acts."; here the Government did that, through powerful statistical proof). Mendelsohn did not present any statistics at all, let alone statistics focused on the Business Development Strategy Group. The only statistical evidence was Sprint's demonstration that the number of over-50 workers in Reddick's organization *increased* following the layoffs. (J.A. 335a, 337a.)

Mendelsohn contends that, under *Teamsters*, she was entitled to present what she calls "discrete decisions" to demonstrate a discriminatory policy. (Mendelsohn Br. 22.) She not only misreads *Teamsters* — which explained that "isolated or . . . sporadic discriminatory acts" do *not* reveal a pattern or practice, 431 U.S. at 336 — she miscites it entirely. *Teamsters* set the rules for class actions, not individual cases. *See id.* at 357-58 (differentiating class proof from individual proof). *Teamsters* permits a *class* plaintiff to present anecdotal evidence to "br[ing] the cold [statistical] numbers convincingly to life," *id.* at 339, but that kind of anecdotal proof necessarily follows, rather than precedes, the demonstration of a classwide pattern or practice. Mendelsohn, like the court of appeals majority, relies on circular reasoning: "me, too" witnesses are admissible if there is a pattern or practice, and a pattern or practice exists if there are "me, too" witnesses.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), provides no more support for Mendelsohn's position. Under *McDonnell Douglas*, evidence of a "general policy and practice" — "statistics," said the Court, not anecdotes — may be "helpful to a

determination of whether [the alleged adverse action] in this case conformed to a general pattern of discrimination." *Id.* at 805. *McDonnell Douglas* does not hold that a discrimination plaintiff can rely on anecdotes involving others.[7]

Mendelsohn contends that the Sprint layoffs were conducted pursuant to what she calls "enterprise-wide reduction-in-force rules and guidelines," with decisions made "at the highest management level at Sprint." (Mendelsohn Br. 1; *see also id.* at 48.) Her misstatement of the record is extreme. Senior management of course determined how much money the business needed to save in cutbacks (J.A. 319a-322a; 333a-334a); it was management's job to grapple with keeping the business solvent amidst the telecommunications industry's

[7] Mendelsohn complains that she would be criticized for presenting too few anecdotes (because they are insufficient) or too many anecdotes (because they are too time-consuming). (Mendelsohn Br. 31-32 n.46.) The complaint is glib but nonresponsive. Anecdotes are anecdotes. Relevant statistical proof, and a nexus to plaintiff's decisionmaker, remain the touchstones. Contrary to Mendelsohn's contention, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), does not hold that a defendant indiscriminately may introduce evidence of the circumstances of others without a foundational showing of nexus. *Cooper* simply did not discuss what foundational showing would be required. Mendelsohn also errs in relying on *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Both cases suggested that appropriate statistical proof could be probative. Neither case analyzed the proper foundation for statistical proof, and the Court need not do so here, because Mendelsohn did not present any.

implosion in 2002.[8] But it is undisputed that individual managers — in Mendelsohn's case, Reddick — decided, on a decentralized basis, which individuals would be laid off. (J.A. 337a-341a.) The only company-wide policy cited by Mendelsohn is Sprint's Displacement Guidelines (J.A. 334a), but nothing in them is even arguably discriminatory. To the contrary, the guidelines invited supervisors in making close retention decisions to give weight to length of service with Sprint. (Mendelsohn Cert. Opp. App. 1b-2b.) That if anything gives a leg up to older workers, because length of service normally correlates positively with age. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 686 (4th ed. 2007).[9]

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[8] Mendelsohn stipulated at trial that she did not dispute the validity of the layoffs as a whole. (J.A. 317a-318a.)

[9] The only other common practice that Mendelsohn alleges is Sprint's introduction of a new employee rating system, "Alpha," in the year that preceded most of the layoffs. The problem that Sprint (like many employers) faced is that the ratings previously given had not differentiated meaningfully among the performance of various persons. Alpha ratings, which were based on a forced distribution, effectuated that differentiation. There is nothing discriminatory in assessing employees' relative performance. During the first year of the new forced-distribution system, Alpha ratings for non-executive managers were not intended to be recorded in the formal personnel file. This phase-in period allowed supevisors to test the system and advise underperforming employees on how to improve before Alpha became the sole evaluation methodology. Layoff decisions were made within Blessing's Business Development Strategy group,

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D. The Evidence Was Not Relevant As "Background" Or To Show A Discriminatory "Culture" Or "Atmosphere."

1. Allegations of a discriminatory "culture" or "atmosphere" must have the requisite foundation.

As Sprint anticipated, Mendelsohn and her *amici* attempt to justify the court of appeals' decision based on foggy concepts of relevance. Here again the offer of proof provides the dispositive response.

At issue in the offer of proof is the anecdotal testimony of five persons, principally assailing three or four Sprint supervisors — Vorhies, Kennedy, Stock and (perhaps) Hussain — none of whom had anything to do with Mendelsohn or the Fee-Reddick-Blessing chain of command. From these, Mendelsohn tells us, a jury could find an "atmosphere" of age discrimination.

Anecdotes do not make an atmosphere. "[T]here is a wide gap" separating "an individual's claim that he has been [mistreated] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982). "One [case] is an anecdote, and several cases are several anecdotes. Judges do not

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(Cont'd)
not in consultation with managers elsewhere, and without reference to Alpha rankings given elsewhere. Nothing in the Alpha system reveals any common scheme or plan to discriminate.

find discrimination on such a thin basis." *Kuhn v. Ball State Univ.*, 78 F.3d 330, 332 (7th Cir. 1996); *see also Teamsters*, 431 U.S. at 336 ("sporadic discriminatory acts" do not establish a pattern or practice). Nexus to plaintiff's decisionmaker — foundation — must be shown.

Mendelsohn and her *amici* hypothesize about a rogue employer, with odious and rampant discriminatory practices, in which one supervisor infers a license or instruction to discriminate based on the words or conduct of others. (Mendelsohn Br. 14, 41.) The defect in this hypothetical is that it bears no relationship to Mendelsohn's proffer here, or the proof in the normal run of cases. We may assume, in an extreme case in which the plaintiff has laid the proper evidentiary foundation, that some relevance potentially might exist. Here, though, Mendelsohn assailed just a handful of supervisors in a 70,000-employee organization. Amidst layoffs affecting some 15,000 persons, Mendelsohn alleged only "isolated or . . . sporadic discriminatory acts," *Teamsters*, 431 U.S. at 336. Her witnesses at the very worst would have shown that Sprint's record of equal employment opportunity had "bruise[s]" in departments far removed from Mendelsohn's own, not that Sprint was "rotten to the core," *Cooper v. Federal Reserve Bank*, 467 U.S. at 880.[10]

[10] Mendelsohn errs in relying on Justice Thomas' opinion in a desegregation case, *Missouri v. Jenkins*, 515 U.S. 70 (1995). Justice Thomas, concurring, observed that "laws from the Jim Crow era created 'an atmosphere in which . . . private individuals could justify their bias and prejudice against blacks . . . .'" (Cont'd)

The proof in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), cited by Mendelsohn, dramatically differs from her proffer here. There the trial court excluded age-biased remarks by (i) Gallagher, the Vice President in charge of plaintiff's division, who was involved in the decision to terminate (rather than transfer) the plaintiff, *id.* at 355; (ii) Hewitt, the Finance Director for the division, who reported directly to Gallagher, *id.* at 356; and (iii) Campbell, the former Director of Human Resources, who also reported directly to Gallagher. The Sixth Circuit found that the evidence should have been admitted because it pertained to the plaintiff's decisionmaker and two senior managers who reported to him within plaintiff's division. *Id.* at 357. Mendelsohn made no comparable showing.

Abrams v. Lightolier Inc., 50 F.3d 1204 (3d Cir. 1995), does not stand for the proposition that anecdotes, untethered to the plaintiff's circumstances, establish a discriminatory "corporate atmosphere." In that case at issue were ageist remarks allegedly made by Richard Kurtz, plaintiff's supervisor and termination decisionmaker. *Id.* at 1214. The Third Circuit correctly affirmed the admission of the alleged remarks by Kurtz, as well as the testimony of five other employees who believed that they also had been mistreated by Kurtz on the basis of age. *Id.* at 1214-15. *Abrams* involved alleged

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(Cont'd)

Id. at 116 (alteration in original). No reasonable person would dispute that there was an atmosphere of discrimination in the Jim Crow South. Mendelsohn's implication — that the isolated anecdotes she alleges at Sprint demonstrate a comparable discriminatory atmosphere — requires no response.

discriminatory remarks and acts by the plaintiff's decisionmaker. The disputed witnesses there (unlike the disputed witnesses here) had something relevant to say.

Sprint here has offered a governing principle of relevance: foundational nexus to the decisionmaker. Mendelsohn offers no governing principle at all. According to her, a single-plaintiff disparate treatment plaintiff in substantially every case can admit "me, too" anecdotes simply by reciting the words "background," "atmosphere" or "culture." The vast majority of court of appeals cases have rejected that contention, and this Court should do so as well.

2. Evidence lacking the proper nexus to the plaintiff is improper character evidence.

Mendelsohn and her *amici* suggest that the disputed evidence should be admitted as "character" evidence, but they overlook whose "character" is at issue.

Mendelsohn was permitted full access to the conventional types of discrimination proof:

- direct evidence of decisionmaker bias;
- comparative evidence of the decisionmaker's treatment of similarly situated persons;
- statistics;

- inferences of discrimination derived from "false reasons," revealing decisionmaker mendacity.

(*See* Sprint Op. Br. 26-27.) Mendelsohn's problem was that she had little or no evidence of discrimination under these usual forms of proof, as the district court specifically found.[11]

Mendelsohn therefore sought to try the cases *of others* to the jury, something that the trial judge rightly refused to allow. Admissibility depends on proof of some relationship between the proffered evidence and the decisionmaker at issue:

> [T]he [plaintiff] may [not] parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the [individual] only by unsubstantiated innuendo. . . . [S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred *and that the [individual] was the actor.*

Huddleston v. United States, 485 U.S. 681, 689 (1988) (emphasis added).

Tellingly, the word "decisionmaker" is virtually nowhere to be found in Mendelsohn's brief or those of

[11] The district judge remarked: "[I]t was my view that [the disputed] testimony would not have affected the outcome of the case in any way . . . . I visited with the jury afterwards and they did not believe this was a close case." (J.A. 452a.)

her *amici*, despite this Court's consistent teaching that disparate treatment is proven (or not) by focusing on that person. (*See* Sprint Op. Br. 11-21.) Mendelsohn instead engages in an assault based on the (supposed) sins of nondecisionmakers, an argument resting on guilt by (attenuated) association. But where — as here — the proffered evidence does not have the requisite foundational link to the decisionmaker, courts of appeals properly have excluded it as improper character evidence. *E.g.*, *Kline v. City of Kansas City*, 175 F.3d 660, 668 (8th Cir. 1999) ("We agree with the trial court that the acts of people who did not supervise or allegedly discriminate against the plaintiffs (and who in most cases did not even work in the same area as the plaintiffs) are not probative of the city's motive, opportunity, intent, or knowledge."); *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 182, 185 (3d Cir. 2000) (it was reversible error to admit evidence about the employment circumstances of others; plaintiff claimed that his supervisors, Goldsmith and Victor, directed customers to "trump up" complaints against him to establish a pretext for his age-based termination, and sought to offer evidence that a different manager, Ramey, had solicited assistance in fabricating similar evidence against another employee to facilitate termination; the Third Circuit reversed, ordering a new trial, because different decisionmakers were at issue; the proffered evidence was not probative of any "plan" by ARCO as a whole because there was no showing of nexus).

The disputed evidence here does not pass the Rule 401 relevance test because it does not shed light on the motivations of those who acted for Sprint in choosing

Mendelsohn for layoff.[12] And, in assailing the "corporate character" of Sprint, rather than testing Mendelsohn's decisionmaker(s), Mendelsohn offered inadmissible character evidence.

II. ALTERNATIVELY, THE EVIDENCE WAS INADMISSIBLE UNDER RULE 403

Mendelsohn has little to say on the Rule 403 issue. Given the deference accorded trial judges' evidentiary rulings, it cannot be said to have been reversible error to exclude the evidence here, even assuming *arguendo* some peripheral relevance.

A. "Me, Too" Evidence Produces Trials-Within-A-Trial, Unduly Consuming Trial Time.

If "me, too" evidence is admitted for the plaintiff, so must "not you, either" evidence be admitted for the defense. That means that trial time will be consumed on trials-within-a-trial over the claims of nonparties.

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[12] Mendelsohn misstates the district court's reasoning in suggesting that the evidence was excluded simply because the district judge did not personally find it very probative. (Mendelsohn Br. 50.) The district court excluded it because she found it *inadmissible*, lacking a foundation of nexus to Mendelsohn and her decisionmaker. Evaluating admissibility is what trial judges do. Mendelsohn and her *amici* suggest, however, that the test for relevance is so low as not to be a test at all. They are incorrect; the relevance test may be a liberal one, but it is not without substance. *United States v. Hollister*, 746 F.2d 420, 422 (8th Cir. 1984) ("Although the definition of 'relevant evidence' given in Federal Rule of Evidence 401 is broad, it does have limits.").

Mendelsohn denies that there would be trials-within-a-trial had her witnesses been admitted, citing a colloquy between counsel in anticipation of a retrial. (Mendelsohn Br. 59.) She is incorrect. The district court recognized that it would have to give Sprint substantial latitude to rebut the claims of the additional witnesses. "I assume if you're doing all these additional witnesses, then we would be looking at a trial which is *ten times as long, five times as long*?," the court asked. (J.A. 444a; emphasis added.) The length of the retrial would "depend[] on how much detail the[] [company] want[s] to get into . . . refuting whatever the[] [new witnesses'] testimony is." (J.A. 444a.) It is true that Sprint in this particular case decided to try to limit the expanded scope of the retrial. (J.A. 445a ("So maybe ten days [o]f trial — if it was eight [days] last time.").) The particular strategic choices by trial counsel here have no bearing on the broader legal issue this Court granted *certiorari* to resolve. The rule of law resulting from this case will be applied in every other. Whatever the scope of any retrial here, the Tenth Circuit's rule, if applied in future cases, assures undue consumption of trial time on trials-within-a-trial.

B. "Me, Too" Evidence Risks Jury Confusion.

Mendelsohn's proffered "me, too" evidence would have distracted the jury from its proper focus: the circumstances of *Mendelsohn's* layoff. Mendelsohn inadvertently concedes the point in her brief, in saying that "a reasonable trier of fact . . . *could care about* age discrimination by other Sprint supervisors." (Mendelsohn Br. 29 (emphasis added); *accord id.* at 31 (a jury "might want to know"); *id.* at 39 ("could . . . want

to know").) Doubtless so, and that is exactly Sprint's point. The Federal Rules of Evidence were not designed to admit whatever a jury "could care about" or "want to know," but rather to focus the jury's attention on what is fairly probative of the plaintiff's own claim. *See, e.g., Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 188 (3d Cir. 1990) ("Evidence that a party committed wrongs other than those at issue in a case often creates a danger of 'unfair prejudice' because such evidence may influence a jury to return a verdict based on a desire to punish for the other wrongs.") (citation omitted). Rule 403 exists precisely to prevent such confusing and unfairly prejudicial testimony. *See Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006) (judges may "exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'") (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986)) (some quotation marks omitted; alteration in original); *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (same); *Huddleston*, 485 U.S. at 687 (same).

Mendelsohn contends, however, that sometimes two or more plaintiffs sue in a single action. If that can occur, says Mendelsohn, then there is no difference in having nonparty witnesses testify about their own circumstances. (Mendelsohn Br. 60-61.) The dispositive response is that unfair prejudice can exist in multiple-plaintiff cases, too. Courts routinely grant separate trials where separation is necessary to prevent the claims of Plaintiff A from tainting a jury's analysis of separate proof pertaining to Plaintiff B. As the Ninth Circuit observed, in affirming a district court's decision to hold separate trials for 10 employees terminated in a series

of reductions-in-force: "The district court properly considered the potential prejudice to [the employer] created by the parade of terminated employees and the possibility of factual and legal confusion on the part of the jury."[13]

C. "Me, Too" Evidence Causes Unfair Prejudice.

Mendelsohn insists that jury instructions will constrain jurors from improper use of possibly inflammatory claims dangled before them. (Mendelsohn Br. 58.) Respectfully, that is not real-world, particularly in a reduction-in-force case — where, axiomatically, substantially all persons laid off are adequately performing incumbents. Each will have a sympathetic story about how it could have been "he, not me" selected

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[13] *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000); *accord, e.g., Wynn v. NBC*, 234 F. Supp. 2d 1067, 1089 (C.D. Cal. 2002) ("Severance is also appropriate here for the more compelling reason of preventing unfair prejudice . . . . [T]here is a substantial risk that one [party] will be tainted by the alleged misdeeds of another, unfairly resulting in guilt by association."); *Bailey v. Northern Trust Co.*, 196 F.R.D. 513, 518 (N.D. Ill. 2000) (severing five claims; "A single trial would require the jury to keep separate each plaintiff's individualized claim . . . presenting the jury with the 'hopeless task of trying to discern who did and said what to whom and for what reason.'") (citation omitted); *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) (severing 11 plaintiffs' claims; "[The] need to focus the jury's attention on the merits of each individual plaintiff's case . . . counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally . . . .").

for layoff.[14] Juror sympathy to these individuals is inevitable, and Rule 403 exists to prevent unfair prejudice. As the Sixth Circuit explained in an oft-cited case:

> [T]he impact of the two former employees' testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided — whether [plaintiff] was discharged because of his age — this testimony [supplied] an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff]'s favor.

Schrand v. Fed. Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988); *accord Haskell v. Kaman Corp.*, 743 F.2d 113, 133 (2d Cir. 1984) ("'[E]ven the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age.'") (citation omitted).

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[14] Even in this Court, Mendelsohn does much the same thing, complaining that, following her layoff, someone else assumed her former duties. (Mendelsohn Br. 48 & n.75.) That is what *always* happens in a layoff; the employer for economic reasons finds it necessary to make do with a smaller staff.

III. NO REMAND IS NECESSARY

The Brief for the United States contends that the district judge should be given an additional opportunity to explain her reasoning. No remand is necessary.

Sprint agrees with much of what the Solicitor General says in his brief. He acknowledges that "If the plaintiff *fails to articulate* a reasonable basis for concluding that other-supervisor evidence would make discrimination against the plaintiff more likely, such evidence may be properly excluded." (U.S. Br. 17-18; emphasis added.) That "articulate[d] . . . reasonable basis" might be foundational proof that discrimination is "the employer's standard operating procedure" (*id.* at 18), or discrimination so rampant as to send a message to all supervisors that age discrimination is "acceptable" (*id.* at 19, 21). The evidence is potentially relevant only "[i]f such a foundation is laid." (*Id.* at 21; *accord id.* at 22.)

No such foundational allegations were made here. Neither in Mendelsohn's offer of proof (J.A. 342a-351a), nor in her opposition to Sprint's motion *in limine* (J.A. 208a-212a), did Mendelsohn allege a discriminatory "standard operating procedure"; only a handful of anecdotes were alleged, none involving any person who had anything to do with the persons who selected Mendelsohn for layoff. Nothing was "articulate[d]" showing any nexus to Mendelsohn, and (as the Solicitor General acknowledges) "without anything reasonable to connect [a witness'] experience to plaintiff's, the evidence would not be relevant" (U.S. Br. 10), because "'isolated or sporadic' examples of alleged

discrimination" fail to "create an inference that discrimination is an employer's standard operating procedure" (*id.* at 19).

The disputed witnesses here are manifestly inadmissible under the test that the Solicitor General correctly articulates. The Solicitor General evidently would have preferred that the district court acknowledge and distinguish hypothetical circumstances in which other-supervisor evidence could have been potentially relevant, but that kind of dictum would have been hypothetical here indeed. The "'isolated or sporadic' examples of alleged discrimination" proffered by Mendelsohn (*id.* at 19) nowhere approach "discriminatory standard operating procedure" proof.

Consider the hypothetical in Section II.A.3 above, the gender-promotion lawsuit against the United States government. If the district court in that hypothetical case issued a succinct order excluding the proffered witnesses — "Evidence excluded; no nexus" — that would be manifestly correct and require no elaboration. With all respect, Sprint disagrees that a busy trial judge should be required to say more.

District judges need not write treatises in support of their evidentiary rulings. Evidentiary disputes in trials are commonplace. It is unreasonable to expect a district judge to write a detailed ruling each time a disputed issue arises. *E.g.*, *United States v. McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998) (affirming the district court's exclusion of evidence; there is no "per se abuse of discretion simply because a trial court failed to make

explicit, on-the-record findings"); *United States v. Graham*, 83 F.3d 1466, 1473 (D.C. Cir. 1996) (trial courts do not commit reversible error by failing to make an on-the-record balancing "'if the considerations germane to balancing probative value versus prejudicial effect are readily apparent from the record'") (citation omitted).

Here the district judge amply explained her reasoning. She said that she was prepared to admit all testimony from fellow employees, provided that there was a foundational nexus ("similarly situated") to plaintiff and her decisionmaker. (Pet. App. 24a.) The judge stated that she intended to ensure that the jury focused on the layoff decision of the plaintiff (*see* J.A. 287a), without being confused by other persons' claims. There was no "per se" or "blanket" exclusion of anything — other than the specific evidence Mendelsohn proffered in opposing the motion and in her offer of proof.

The district judge was entitled to base her decision on what was in — and conspicuously absent from — Mendelsohn's proffer. It is too late in the going for anyone now to second-guess the district judge for not analyzing a hypothetical evidentiary foundation that Mendelsohn never laid. Sprint respectfully suggests that there is nothing to criticize in the district judge's articulation of her reasoning.

And even if the Solicitor General were correct in suggesting that the district court applied an incorrect legal standard, there still would be no need for a remand. The case cited by the Solicitor General, *Koon v. United States*, 518 U.S. 81 (1996), is inapposite; it involves the exercise of discretion in criminal sentencing. Evidentiary

decisions in civil cases, by contrast, are governed by the harmless-error standard articulated in Federal Rule of Evidence 103(a) and Federal Rule of Civl Procedure 61. Appellate courts may not overturn an incorrect evidentiary ruling unless it is "inconsistent with substantial justice," FED. R. CIV. P. 61, or "unless a substantial right of the party is affected," FED. R. EVID. 103(a). No ground for reversal exists where a court *incorrectly* excludes evidence, but no prejudice results. *E.g., McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1142 (10th Cir. 2006) ("Even assuming the district court abused its discretion in excluding evidence, we must also determine whether the exclusion was harmless error . . . ."). *A fortiori* no ground for reversal exists where a court *correctly* excludes evidence — albeit for an incorrectly articulated reason. *E.g., Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (10th Cir. 1984) (affirming the trial court's evidentiary rulings; appellate courts are "not bound by the evidentiary basis relied upon by the trial court").

For the reasons set forth above Mendelsohn's evidence manifestly was inadmissible under Rule 401, and certainly under Rule 403. There was no error in the judge's articulation of her reasoning, but even if there was it was harmless. There is no need for remand.

CONCLUSION

The offer of proof failed to reveal any logical nexus between the disputed evidence and Mendelsohn's decisionmaker. It would have been reversible error for the district court to admit the disputed evidence here. Certainly, and at a minimum, the district court did not abuse its discretion in excluding it.

Respectfully submitted,

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No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO., PETITIONER

v.

ELLEN MENDELSOHN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The following two questions are subsumed within the question presented:

1. Whether a plaintiff employee claiming disparate treatment under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, may be categorically barred from introducing evidence that other employees were subjected to age discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff.

2. Whether the court of appeals erred in directing the admission of respondent's other-supervisor evidence, rather than remanding for a determination of admissibility under the correct legal standard.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances a plaintiff claiming disparate treatment under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, may introduce evidence that other employees were subjected to age discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff. The Equal Employment Opportunity Commission has authority under the ADEA to file suit against employers who have engaged in discrimination on the basis of age. The United States defends employment discrimination actions brought by federal employees under the ADEA. As a litigant on both sides of employment discrimination actions under the ADEA, the United States has a substantial interest in the resolution of the question presented in this case.

STATEMENT

1. The ADEA makes it "unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). A plaintiff alleging disparate treatment in violation of the ADEA must show that age "actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). To satisfy that burden, the plaintiff must show that age "actually played a role in that process and had a determinative influence on the outcome." *Ibid.*

2. a. In 2002, as part of an ongoing company-wide reduction-in-force (RIF), petitioner Sprint discharged respondent. Pet. App. 2a. At the time, respondent was 51 years of age and the oldest manager in her group. *Ibid.* Respondent filed suit in federal district court, alleging that Sprint terminated her because of her age, in violation of the ADEA. *Id.* at 1a.

Before trial, Sprint filed a motion in limine to exclude any evidence that Sprint has a pattern and practice or culture of age discrimination. Mot. in Limine 1; Mem. in Supp. of Mot. In Limine 1. In support of that request, Sprint argued that respondent was foreclosed from introducing such evidence because she was not asserting a pattern or practice claim. Mem. in Supp. of Mot. in Limine 1. Sprint also moved to exclude testimony that Sprint had discriminated against any other employee unless the allegedly discriminatory employment decision was made by the same supervisor who terminated respondent. Mot. in Limine 1; Mem. in Supp. of Mot. in Limine 1-2. In support of that request, Sprint argued that the Tenth Circuit's decision in *Aramburu* v. *Boeing Co.*, 112 F.3d 1398, 1404 (1997), categorically bars the introduction of such "other-supervisor" evidence. Mem. in Supp. of Mot. in Limine 2.

Respondent opposed Sprint's motion in limine. She argued that evidence that her employer discriminated against other employees in the same RIF is relevant to a finding that the asserted basis for terminating her as part of that RIF was pretextual, and that the relevance of such evidence did not depend on whether the employees shared the same supervisor as her. Mem. in Opp. to Mot. in Limine 1-4. Respondent also argued that a pattern or practice allegation is not a necessary precondi-

tion for the admission of such other-supervisor evidence. *Id.* at 4.

The district court granted Sprint's motion by a one-paragraph minute order. The order excludes any evidence that Sprint "has a pattern and practice, culture or history of age discrimination," and any testimony that Sprint discriminated against other employees unless respondent's supervisor "was the decision-maker in any adverse employment action." Pet. App. 24a. The district court did not explain the basis for its order.

b. Following that ruling, respondent submitted an offer of proof detailing evidence that she had intended to introduce concerning Sprint's discrimination against other employees. That offer of proof summarized the deposition testimony of five Sprint employees who were terminated in the same RIF as respondent by supervisors other than respondent's supervisor. All five of the employees were over 40 years of age and worked in a different work group than respondent. See Offer of Proof. 1-7.

According to the offer of proof, Bonnie Hoopes would have testified that, near the time she was terminated, her supervisor, Sharon Vorhies, told her that she was too old for the job. Offer of Proof 2. Hoopes would also have testified that Vorhies sent an email to her and four other Sprint employees reciting Jack Welch's philosophy that "A" employees are employees who "are blessed with lots of runway ahead of them." *Id.* at 2, Exh. A. Hoopes would have also testified that she was told that her job was being eliminated, when in fact other employees were doing her job. *Id.* at 2.

Yvonne Wood would have testified that she accidentally received a copy of a spreadsheet from a supervisor named Dan Kennedy entitled "layoffs" or "RIFs" that

indicated that age was considered in selection decisions. Offer of Proof 3. Wood would also have testified that Sprint hired young employees through a Staff Associate Program and put them on a fast track to management positions. *Ibid.* Wood would have further testified that one employee hired through that program was given training to do Wood's job. *Ibid.*

Sharon Miller would have testified that Sprint Manager Ted Stock frequently made derogatory remarks about older persons in her presence and that of other senior managers. Offer of Proof 4. Miller would have testified that Stock told her and other senior managers that he had too many older people in his department, and that he told her that he was waiting for layoffs so he could clean up his department. *Ibid.* Miller would also have testified that when she wanted to hire an older person into an open position, Stock told her that he wanted someone younger in that job. *Ibid.*

John Borel would have testified that he was told that he was terminated because his position was eliminated, not because of poor performance. Offer of Proof 5. When Borel applied for another position with Sprint, however, he was told that he had a poor performance rating in his file and therefore could not be hired. *Ibid.* Borel subsequently learned that another employee had been hired to fill his old position, contradicting the explanation he had been given for his termination. *Ibid.* When he contacted his ex-supervisor, Janet Mathus, she told him that while his performance was not a problem, she was forced to give him a low rating by Mohammad Hussain. *Id.* at 5-6.

John Hoopes would have testified that he was replaced by someone who lacked the qualifications for the job. Offer of Proof 6. While Hoopes was supposedly

terminated based on an Alpha rating, his supervisor did not even know his rating. *Ibid.* Hoopes would also have testified that when he wanted to hire someone over 40 years of age, he had to get his Vice President's approval. *Ibid.* After his termination, Hoopes often used Sprint's outplacement service to apply for open jobs at Sprint. *Id.* at 6-7. Hoopes never received a single offer despite his qualifications. *Id.* at 7. Hoopes also noticed that the vast majority of former Sprint employees who used the outplacement service were over the age of 40. *Ibid.*

c. During the course of trial, the district court reiterated its ruling that it would not allow respondent to introduce evidence that Sprint had discriminated against other employees unless the allegedly discriminatory decision was made by respondent's supervisor. Pet. App. 12a. The court also clarified that it would allow respondent to present evidence on whether Sprint followed its own procedures during the RIF, including spreadsheets containing the ages of certain Sprint employees considered for termination. *Id.* at 11a-12a. Following an eight-day trial, a jury returned a verdict in favor of Sprint. *Id.* at 4a.

3. In a 2-1 decision, the court of appeals reversed. Pet. App. 1a-23a. The court concluded that the other-employee evidence that respondent sought to introduce was "relevant to Sprint's [alleged] discriminatory animus toward older workers," and that the district court's categorical bar on the introduction of evidence that Sprint discriminated against other employees unless they shared respondent's supervisor had unfairly prevented respondent from making her case, and therefore constituted an abuse of discretion. *Id.* at 2a, 4a-5a; see *id.* at 14a-15a n.4.

The court of appeals noted that its prior decisions had allowed the introduction of evidence that the plaintiff's employer discriminated against other employees because a pattern of discrimination is circumstantial evidence that the employer acted with a discriminatory motive against the plaintiff. Pet. App. 6a. The court rejected Sprint's contention that respondent's failure to assert a pattern or practice claim foreclosed the introduction of such pattern or practice evidence, explaining that such evidence is also relevant to prove discrimination in an individual disparate treatment case. *Id.* at 6a n.2.

The court of appeals also rejected Sprint's argument that the district court's categorical bar on other-supervisor evidence was supported by its prior decision in *Aramburu*. Pet. App. 7a. The court explained that *Aramburu* held other-supervisor evidence inadmissible only in cases alleging discriminatory discipline. *Ibid.* The court held that *Aramburu*'s same-supervisor rule has no application where, as here, a plaintiff claims to be a victim of a company-wide discriminatory RIF. *Id.* at 9a. The court reasoned that applying the same-supervisor rule in that context would make it difficult, if not impossible, for a plaintiff to prove discrimination. *Ibid.* By relying on *Aramburu*, the court of appeals concluded, the district court had erred as a matter of law and therefore abused its discretion. *Id.* at 14a n.4.

The court of appeals then held that respondent's proffered testimony from other Sprint employees was relevant to respondent's claim of discriminatory treatment because it was "logically and reasonably tied" to the decision to terminate respondent. Pet. App. 9a. The court reasoned that, while the other employees did not share the same supervisor as respondent, all of the employees

were terminated within a year of respondent's termination as part of the same company-wide RIF, all of the employees were in the protected age group, and all of the employees were terminated based on similar criteria. *Id.* at 9a-10a.

The court of appeals rejected the argument that evidence that an employer discriminated against other employees is inadmissible unless the plaintiff has "independent evidence" that the employer has a company-wide policy of discriminating. Pet. App. 10a. The court explained that respondent had "proffered independent evidence in the form of testimony from other Sprint employees who were similarly treated during the RIF," and that such evidence is itself probative of a policy of discrimination. *Ibid.*

The court of appeals also concluded that respondent's proffered other-supervisor evidence, while not conclusive evidence that respondent was subjected to discrimination, was sufficient to "cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for its motive in terminating [respondent]." Pet. App. 14a (citation and internal quotation marks omitted). The court explained that "[a]ge as a motivation for Sprint's selection of [respondent] to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." *Ibid.* The court therefore concluded that respondent's proffered witnesses "should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony." *Id.* at 13a.

The court of appeals also held that respondent's other-supervisor evidence was not subject to exclusion under Rule 403 of the Federal Rules of Evidence. Pet. App. 15a. The court explained that while the admission of the evidence might require Sprint to defend against multiple claims of discrimination, that inconvenience to Sprint was insufficient to outweigh the probative value of respondent's other-supervisor evidence. *Ibid.* Thus, the court concluded, "[b]ased on the record before us, we cannot say the evidence is unduly prejudicial." *Id.* at 16a.

Judge Tymkovich dissented. Pet. App. 17a-23a. He agreed with the majority that "the district court's ruling is difficult to decipher, especially looking solely at the minute order." *Id.* at 17a. But he concluded that the decision whether to admit respondent's other-supervisor evidence constituted "a classic judgment call," and that while the district court "would not have erred" in admitting respondent's proffered evidence, "the court did not abuse its discretion in choosing to exclude it." *Id.* at 20a.

Judge Tymkovich concluded that respondent "had an adequate opportunity to introduce relevant evidence of Sprint's corporate policies and practices surrounding the RIF and argue that the RIF was itself a pretext for age discrimination." Pet. App. 19a. In addition, he viewed the proffered testimony as "a mixture of hearsay and speculation that would be marginally admissible in any event." *Ibid.* Accordingly, he concluded that it was not possible to "say that the court erred in excluding such testimony under the standards of Rule 403." *Ibid.*

Judge Tymkovich concluded that the "larger problem" with the majority's decision was that it suggested a per se rule that other-supervisor evidence is admissible in cases involving a RIF. Pet. App. 20a. Judge

Tymkovich also concluded that because Sprint is a large employer, evidence that five employees may have been subjected to discrimination "is not meaningful." *Ibid.* Judge Tymkovich also stated that he would exclude other-supervisor evidence unless there was independent evidence of a company policy of discrimination. *Id.* at 22a.

Finally, Judge Tymkovich concluded that if the majority were correct in holding that the district court excluded the other-supervisor evidence based on an erroneous legal standard, the court should have remanded for application of the proper legal rule rather than determining the admissibility of the evidence itself. Pet. App. 22a n.3. In his view, the majority's decision directing the admission of the other-supervisor evidence in this case, if not all cases involving RIFs, "runs counter to our traditional deference to district courts as the primary arbiters of admissibility." *Id.* at 23a.

SUMMARY OF ARGUMENT

Other-supervisor evidence is sometimes, but not always, admissible in an ADEA disparate treatment case.

A. The Federal Rules of Evidence establish a low threshold for relevancy. Under Rule 401, evidence is relevant if it has "any tendency" to make the plaintiff's claim more probable. A plaintiff alleging disparate treatment under the ADEA can prove that claim by showing that age motivated the supervisor delegated the authority to take the challenged action on behalf of the employer. Accordingly, evidence is relevant if it has any tendency to make more probable that age motivated that supervisor's decision.

B. Other-supervisor evidence may satisfy Rule 401's gateway threshold. Indeed, even a single act of discrim-

ination by another supervisor can satisfy that standard, such as where the evidence concretely suggests that a company-wide campaign is afoot. A pattern or practice of discrimination by other supervisors can also be relevant in proving that age motivated the plaintiff's supervisor, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973), such as when the pattern suggests that supervisors in the company as a whole, or within the geographic area or business unit in which the plaintiff's supervisor works, view age discrimination as a practice that the employer will tolerate.

Other-supervisor evidence, however, is not always relevant. For example, if an employee proffered testimony concerning alleged discrimination against her by a supervisor who had no relationship to the plaintiff or the plaintiff's supervisor, without anything reasonably to connect her experience to plaintiff's, the evidence would not be relevant. In addition, isolated or sporadic acts of discrimination do not, by themselves, create a relevant pattern of discrimination.

The plaintiff's theory of his case also bears on the relevancy determination. Other-supervisor evidence is more likely to be relevant when the plaintiff's theory is that his supervisor acted as a part of a company-wide "youth movement," than when the plaintiff's theory is that his supervisor simply had it out for him.

C. Relevant other-supervisor evidence is not automatically admissible. In particular, Rule 403 of the Federal Rules of Evidence allows a court to exclude other-supervisor evidence when its probative value is substantially outweighed by the danger of jury confusion, unfair prejudice, or undue delay. While that determination is necessarily record-intensive, certain guideposts are pertinent.

Relevant other-supervisor evidence can help the jury to understand why the plaintiff was treated the way that she was in a way that other evidence may not. In addition, because direct proof of a supervisor's discriminatory intent is often unavailable, other supervisor evidence can be important circumstantial evidence that age motivated the plaintiff's supervisor. At the same time, other-supervisor evidence always creates some risk that the jury will be distracted by disputes over whether other employees were subjected to discrimination, and some risk that the jury will make the mistake of thinking that just because one person was subjected to discrimination, the plaintiff must have been.

Based on such general considerations, when other-supervisor evidence has substantial probative force, its probative value generally would not be substantially outweighed by the risk of jury confusion and unfair prejudice. On the other hand, where other-supervisor evidence has only marginal probative value, Rule 403 concerns may well substantially outweigh the probative value of the evidence and justify a decision to exclude it.

D. The decision whether to admit or exclude evidence is largely left to the district court's discretion. A district court, however, necessarily abuses its discretion when it excludes evidence based on an incorrect legal standard. The court of appeals properly concluded that the district court in this case committed such a legal error when it excluded respondent's evidence based on a categorical rule that other-supervisor evidence is per se inadmissible.

E. The court of appeals nonetheless erred in ordering the district court to admit respondent's other-supervisor evidence. When an appellate court determines that a district court has excluded evidence based on an incor-

rect legal standard, it should remand to the district court for a determination under the correct legal standard, unless the record permits only one possible resolution of the issue. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

To the extent that the court of appeals concluded that the exclusion of the respondent's evidence necessarily would constitute an abuse of discretion, it did so based on an incorrect legal standard. The court reasoned that other-supervisor evidence is necessarily admissible whenever the other employees were terminated in the same RIF, were in the protected class, and were subject to the same procedures. But not all evidence falling within that broad category is necessarily relevant. Still less would a district court be required to conclude that all such evidence has probative force that would not be substantially outweighed by the risk of jury confusion, unfair prejudice, or undue delay. Accordingly, rather than resolving the issue itself, the court of appeals should have remanded to the district court to determine the admissibility of respondent's other-supervisor evidence under the correct legal standard.

Rather than engaging in a record-intensive de novo review of the court of appeals' own (de novo) Rule 401 and 403 determinations, this Court should answer the question presented by holding that other-supervisor evidence is sometimes, but not always, admissible to prove disparate treatment under the ADEA; it should provide some general guidance on when it would and would not be admissible; and it should direct that the case be sent back to the district court for a determination of admissibility under the correct legal standards.

ARGUMENT

IN A CASE ALLEGING DISPARATE TREATMENT UNDER THE ADEA, OTHER-SUPERVISOR EVIDENCE IS SOMETIMES, BUT NOT ALWAYS, ADMISSIBLE

This case involves the admissibility of "other-supervisor evidence"—evidence that other employees of the plaintiff's employer were subjected to discrimination by a supervisor other than the supervisor who made the decision challenged by the plaintiff. When a plaintiff brings a disparate treatment claim under the ADEA, other-supervisor evidence is sometimes, but not always, admissible. Because the district court *categorically* barred the introduction of other-supervisor evidence, it abused its discretion by applying an erroneous legal standard. The court of appeals, however, went too far in the other direction when it required the admission of respondent's other-supervisor evidence. After determining that the district court excluded the evidence based on an incorrect legal standard, the court of appeals should have remanded to the district court to determine the admissibility of respondent's other-supervisor evidence under the correct legal standard.[1]

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[1] Petitioner refers to the question as involving the admissibility of "me, too" evidence. Because "me, too" evidence would include evidence relating to acts of the same supervisor who made the decision challenged by the plaintiff, and may not capture the essence of the evidence in any event, this brief uses the term "other-supervisor" evidence to describe the evidence at issue. In this case, the question whether other-supervisor evidence is admissible arises in the context of a claim of disparate treatment under the ADEA. But the same basic standards that govern the admissibility of such evidence under the ADEA would apply under other statutes that forbid disparate treatment, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

A. Evidence Is Relevant In An ADEA Disparate Treatment Case If It Has "Any Tendency" To Make More Probable That Age Motivated The Plaintiff's Supervisor To Take The Challenged Action

1. Like all litigation in the federal courts, the admissibility of evidence in ADEA cases is governed by the Federal Rules of Evidence. See Fed. R. Evid. 101. Under Rule 402, all relevant evidence is admissible, except as otherwise provided by the Constitution, Acts of Congress, other Federal Rules, or rules prescribed by this Court. Evidence that is not relevant, by contrast, is inadmissible. Rule 401 defines relevant evidence in broadly encompassing language as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

By making evidence relevant when it has "any tendency" to make a consequential fact "more probable or less probable than it would be without the evidence," Rule 401 sets a purposely low gateway threshold for the introduction of evidence. Under that standard, "[e]vidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable than not." 2 *Weinstein's Federal Evidence* § 401.04[2][b], at 401-21 (Joseph M. McLaughlin ed., 2d ed. 2007). Instead, the sole question "is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if that person knew of the proffered evidence." *Ibid.* That standard may be satisfied even if the evidence "only slightly affects the trier's assessment of the probability of the matter to be proved." *Id.* § 401.04[2][c][ii], at 410-25.

Rule 401 thus establishes a low threshold for determining what evidence is relevant, and thus potentially admissible, in federal cases. The Federal Rules of Evidence establish other limitations—including Rule 403, discussed below—on the admission of relevant evidence that passes Rule 401's relatively undemanding gateway threshold.

2. The key consequential fact that a plaintiff claiming disparate treatment in violation of the ADEA must prove is that age "actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). Because the ADEA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, generally incorporates common law agency principles, see 29 U.S.C. 630(b), a plaintiff can satisfy that burden by showing that age motivated the supervisor delegated the authority to take the challenged action on behalf of the employer. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 760-763 (1998). Evidence is therefore relevant in an ADEA disparate treatment case if it has "any tendency" to make more probable that age motivated that supervisor's decision.

Like Title VII, the ADEA, does not restrict the categories of evidence that a plaintiff may introduce to prove that a supervisor acted with an improper motive. And this Court has repeatedly held that a plaintiff alleging disparate treatment may rely on any direct or circumstantial evidence, including evidence that the stated reason for the employer's decision is pretextual. *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 99 (2003); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *USPS* v. *Aikens*, 460 U.S. 711, 714 n.3, 716 (1983); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).

B. Other-Supervisor Evidence Can Be Relevant In A Number Of Circumstances

1. One category of circumstantial evidence that makes it more probable that age motivated the plaintiff's supervisor in making the decision challenged by the plaintiff is evidence that age motivated the *same* supervisor to engage in acts of discrimination against other employees. The admission of such evidence "is merely an application of the well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.'" *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 207 (1973) (quoting 2 John Henry Wigmore, *Evidence* 200 (3d ed. 1940)).

2. That does not mean, however, that only acts of discrimination committed by the same supervisor are relevant. When the plaintiff can produce evidence that other supervisors have engaged in acts motivated by an employee's age, it may, in some circumstances, also tend to suggest that the plaintiff's supervisor acted with the same motive, and therefore satisfy Rule 401's threshold.

For example, if a supervisor other than the plaintiff's supervisor dismissed an employee at the same time as the plaintiff was dismissed and told the employee that he was dismissing him "because the company is on a youth campaign," a jury could reasonably draw an inference that the supervisor who dismissed the plaintiff was responding to the same company-wide youth campaign. That evidence does not conclusively prove that the plaintiff's supervisor was motivated by age. But since a reasonable factfinder could conclude that evidence of a company-wide youth movement increases the probabil-

ity that age motivated the plaintiff's supervisor, it satisfies Rule 401's inclusive relevancy standard.

Similarly, Rule 401's relevancy standard would also be satisfied by evidence that the manager to whom the plaintiff's supervisor reports terminated an employee the month before the plaintiff's termination and communicated to the plaintiff's supervisor that his decision was based on age. Because experience suggests that supervisors often take their cues on what actions they may take from the manager to whom they report, a reasonable factfinder might regard that evidence as increasing the likelihood that the plaintiff's supervisor discriminated on the basis of age.

Likewise, if a supervisor who terminated another older worker gave the same distinctive explanation for the decision that the plaintiff's supervisor gave for the decision to terminate the plaintiff, and the evidence showed that the other supervisor's explanation was pretextual, such evidence might suggest to a reasonable factfinder that the two supervisors shared information on how to cover up discrimination. A reasonable factfinder could also regard the similarity in explanations as a coincidence, but the evidence is sufficiently suggestive of the possibility that the two supervisors coordinated their discriminatory acts to satisfy Rule 401's relevance standard.

As those examples illustrate, evidence of a single act of discrimination by a different supervisor can satisfy Rule 401's relevancy standard. Rules 401 and 402 do not categorically bar the admission of such evidence. By the same token, Rules 401 and 402 do not categorically require the admission of other-supervisor evidence. If the plaintiff fails to articulate a reasonable basis for concluding that other-supervisor evidence would make dis-

crimination against the plaintiff more likely, such evidence may be properly excluded.

For example, if an employee who worked for another supervisor in another part of a corporation were to provide testimony relating to her own experience of perceived discrimination by a supervisor who had no relationship to the plaintiff or her supervisors, without anything reasonably to connect that experience to the plaintiff's experience, the evidence would not be relevant, because it would shed no light on the motives of the plaintiff's supervisor. Standing alone, such anecdotal testimony involving an unrelated supervisor is not relevant to a plaintiff's case because it does not provide a reasonable basis for a factfinder to conclude that the plaintiff's claim of discrimination is more likely.

3. Another category of other-supervisor evidence that can be relevant in establishing that age motivated the plaintiff's supervisor is evidence of a pattern or practice of discrimination by other supervisors. *McDonnell Douglas*, 411 U.S. at 804-805. Indeed, where a plaintiff can show that a pattern of age discrimination is so widespread as to be the employer's standard operating procedure, such evidence is more than merely relevant. In that circumstance, "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," shifting the burden to the employer "to demonstrate that the individual [claiming discrimination] was denied an employment opportunity for lawful reasons." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 362 (1977).

Other-supervisor evidence may often fall short of proving that discrimination is an employer's standard

operating procedure. For example, "isolated or sporadic" examples of alleged discrimination are not sufficient, by themselves, to create an inference that discrimination is an employer's standard operating procedure. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 875-876 (1984). See *Wyvill* v. *United Companies Life Ins. Co.*, 21 F.3d 296, 302 (5th Cir. 2000) ("A 'pattern or practice' of discrimination does not consist of 'isolated or sporadic discriminatory acts by the employer.'") (quoting *Cooper*, 467 U.S. at 875-876), cert. denied, 531 U.S. 1145 (2001).

In order to be relevant, however, a pattern of discrimination against members of a protected group need not be so widespread and systematic as to support an inference that discrimination is the employer's standard operating procedure and that each individual denied an employment opportunity who is a member of the group is more likely than not a victim of discrimination. Like other circumstantial evidence, a pattern of discrimination is relevant if it makes it more probable that the plaintiff is a victim of discrimination, even if the increase in probability is not great.

That standard can be satisfied when a reasonable factfinder could view the pattern of age discrimination as suggesting not that age discrimination is the employer's standard operating procedure, but that supervisors view age discrimination as a practice that the employer will tolerate. When the pattern of age discrimination indicates that supervisors within the company as a whole, or within a geographic area or business unit of the company in which the plaintiff's supervisor works, view age discrimination as an acceptable option, it increases the probability that age motivated the plaintiff's supervisor in taking the action challenged by the plaintiff.

In determining whether a pattern of discrimination is sufficient to create that inference, a number of factors may be pertinent. They include: the number of supervisors who have allegedly engaged in discrimination, the size of the employer, the frequency of the alleged discrimination, whether the discrimination has occurred in a geographic area or business unit in which the plaintiff's supervisor works, whether the discrimination is practiced openly, whether notice of the discrimination has reached high-level managers of the employer, and whether the discrimination has occurred reasonably close in time to the time of the act challenged by the plaintiff.

Thus, when the evidence shows that a significant number of supervisors in the business unit in which the plaintiff's supervisor works openly practiced discrimination within months of the action challenged by the plaintiff, and that high-level managers were aware of it, Rule 401's relevancy standard would be satisfied. On the other hand, where the evidence shows that two supervisors in a separate business unit in a different geographic area engaged in discrimination many months or years ago and no high-level manager was aware of it, the evidence would not satisfy Rule 401's relevancy standard. In between those examples are numerous permutations in which pattern or practice evidence would sometimes be relevant, sometimes be irrelevant, and sometimes require a judgment call by the district court.

For purposes of determining whether other-supervisor evidence adds up to a relevant pattern or practice, it makes no difference whether a plaintiff is asserting an individual claim or a pattern or practice claim. The force of the evidence in tending to establish that an individual has suffered discrimination is the same in either

event. Indeed, in *McDonnell Douglas*, 411 U.S. at 804-805, the Court expressly indicated that pattern or practice evidence can be relevant in an individual case in showing that the employer's explanation for adversely treating the plaintiff is pretextual. On the other hand, the plaintiff's own theory of discrimination may affect the relevance of other-supervisor evidence. If the plaintiff's theory is that his or her immediate supervisor responded to a company-wide policy favoring youth, other-supervisor evidence is more likely to be admissible, all else being equal, than if the plaintiff's theory is that his or her supervisor engaged in an isolated discriminatory act.

The Federal Rules of Evidence do not contain any requirement that a plaintiff introduce evidence that is independent of the other-supervisor evidence in order to make that evidence relevant. An adequate foundation is laid under Rule 104(b) of the Federal Rules of Evidence when plaintiff's other-supervisor evidence as a whole (together with whatever other evidence the plaintiff proffers) could lead a reasonable factfinder to conclude that discrimination is the employer's standard operating procedure or that supervisors in the company as a whole, or in the geographic area or business unit in which plaintiff's supervisor works, view discrimination as an acceptable option that the employer will tolerate. Cf. *Huddleston* v. *United States*, 485 U.S. 681, 689-690 (1988). If such a foundation is laid, a reasonable factfinder could conclude that the pattern or practice evidence makes more probable that the plaintiff's supervisor was motivated by age. For purposes of assessing the

relevance of other-supervisor evidence, that is all that the Federal Rules of Evidence require.[2]

C. Relevant Other-Supervisor Evidence May Be Excluded When Its Probative Value Is Substantially Outweighed By The Danger Of Jury Confusion Or Unfair Prejudice

Even when evidence is relevant, it is not automatically admissible. Rule 403 of the Federal Rules of Evidence allows a court to exclude relevant evidence when its probative value is substantially outweighed by other considerations, such as the danger of jury confusion, unfair prejudice, or undue delay. Determining whether relevant other-supervisor evidence should be excluded under Rule 403 is necessarily a record-intensive inquiry, and trial courts traditionally have "wide latitude to exclude evidence that is * * * only marginally relevant or poses an undue risk of prejudice * * * or confusion of the issues." *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986) (citation and internal quotation marks omitted). In undertaking that inquiry, however, several general guideposts are pertinent.

For example, other-supervisor evidence can have persuasive force—and thus probative value—that other evidence lacks. In *Teamsters*, the Court emphasized that the government's evidence that individuals who testified about their personal experiences with the company brought the "cold numbers" supporting the govern-

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[2] Once an adequate foundation has been laid for the admission of pattern or practice evidence, an individual piece of other-supervisor evidence would be relevant if it makes more probable either that discrimination is the employer's standard operating procedure or that supervisors in the company as a whole, or in the geographic area or business unit in which the plaintiff's supervisor works, viewed discrimination as an acceptable option.

ment's pattern or practice claim "convincingly to life." 431 U.S. at 339. Other-supervisor evidence can have a similar impact in an individual case. When other-supervisor evidence is relevant in establishing that age motivated the plaintiff's supervisor, it can help the jury to understand why the plaintiff was treated the way that she was in a way that other evidence may not. In addition, because direct proof of a supervisor's discriminatory intent is often unavailable, other supervisor evidence can be important circumstantial evidence in establishing discriminatory intent.

At the same time, other-supervisor evidence always creates some risk that the jury will be distracted by disputes over whether *other* employees were subjected to discrimination and therefore fail to focus sufficiently on the question whether the plaintiff was a victim of discrimination. Other-supervisor evidence also always creates some risk that the jury will make the mistake of thinking that just because one person was subjected to discrimination, the plaintiff must have been, or still worse, that the employer should be punished for an act of discrimination against someone other than the plaintiff even when the plaintiff has not been subjected to discrimination. Cf. *Old Chief* v. *United States*, 519 U.S. 172, 180-181 (1997); see also *Phillip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007) (noting "risks of unfairness" in jury consideration of injury to third parties). In addition, particularly egregious examples of discrimination can inflame jurors' passions and heighten these risks of jury confusion or prejudice.

In general, when other-supervisor evidence has substantial probative force, generalized concerns of jury confusion and unfair prejudice ordinarily do not outweigh, much less *substantially* outweigh, the probative

value of the other-supervisor evidence and therefore do not justify the exclusion of the evidence under Rule 403. In that circumstance, concerns relating to jury confusion and unfair prejudice ordinarily may be addressed with appropriate jury instructions. See Fed. R. Evid. 403 advisory committee's note. On the other hand, where the other-supervisor evidence has only marginal probative value, the balance changes. In that circumstance, concerns about jury confusion and unfair prejudice may well substantially outweigh the probative value of the evidence and justify a decision to exclude it. Cf. *Old Chief*, 519 U.S. at 191. Here, too, the plaintiff's theory of the case and the extent to which he or she relies on company-wide incentives or idiosyncratic behavior can affect the district court's balancing. As in other contexts, district courts—as the "primary arbiters of admissibility" (Pet. App. 23a)—have discretion to conduct the Rule 403 balancing taking account of those general considerations, and the particular facts and circumstances of the cases before them.

D. The District Court Abused Its Discretion In Categorically Excluding The Other-Supervisor Evidence At Issue Here

A district court ruling on the relevance of evidence is subject to review under an abuse of discretion standard. *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974). Similarly, rulings under Rule 403 are subject to review under an abuse of discretion standard. *Old Chief*, 519 U.S. at 183 n.7. Under an abuse of discretion standard, the decision whether to admit or exclude evidence is largely left to the district court's discretion. *Hamling*, 418 U.S. at 125; *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947). At the same time, however, when a court excludes evidence based on an incorrect legal

standard, it necessarily abuses its discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996).

The district court in this case committed legal error—and therefore abused its discretion—when it excluded the proffered other-supervisor evidence. The district court did not explain the basis of its ruling. But the most plausible explanation for its ruling is that it concluded that other-supervisor evidence is per se inadmissible in an individual case alleging disparate treatment (as opposed to a pattern or practice). That is how the court of appeals construed the order. See Pet. App. 3a, 14a n.4. That was the only basis on which petitioner sought exclusion of the evidence, the district court defined the category of *admissible* evidence as proof that respondent's supervisor "was the decision-maker in any adverse employment action," *id.* at 24a, and there is nothing else in the course of the proceedings to suggest that the district court excluded the evidence on any other basis.

For the reasons previously discussed, other-supervisor evidence is not per se inadmissible in an individual disparate treatment case under the ADEA; it sometimes makes it more probable that age motivated the plaintiff's supervisor; and its probative value is not always substantially outweighed by the factors set forth in Rule 403. Because the district court excluded respondent's other-supervisor evidence based on an incorrect legal standard, the court of appeals properly held that the district court abused its discretion in excluding the proffered evidence. Pet. App. 5a.

E. The Court Of Appeals Erred In Directing The District Court To Allow The Other-Supervisor Witnesses To Testify

After the court of appeals concluded that the district court used an incorrect legal standard in excluding respondent's other-supervisor evidence, it did not remand to the district court so that it could consider the admissibility of the evidence under the correct standard. Instead, the court of appeals determined for itself that respondent's witnesses should be allowed to testify. Pet. App. 13a. In following that course, rather than remanding to the district court, the court of appeals erred.

1. The court of appeals did not clearly articulate its rationale for resolving the issue of admissibility itself rather than remanding to the district court for a determination under the correct legal standard. But parts of the court of appeals' opinion suggest that it believed that once an appellate court sets aside a district court's ruling because it is based on an incorrect legal standard, the appellate court is then free to decide independently whether the evidence is relevant, and if so, whether its probative value is substantially outweighed by the considerations in Rule 403. Pet. App. 9a-10a (relevance); *id.* at 15a (Rule 403). That reading of the decision is consistent with prior Tenth Circuit precedent holding that the court of appeals may engage in de novo balancing under Rule 403. *United States* v. *McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

When a district court applies an incorrect legal standard in an area in which that court has discretion, an appellate court should ordinarily remand for a determination under the correct legal standard rather than resolve the issue itself. *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 438-439 (1996); *Vincent* v. *Louis*

Marx & Co., 874 F.2d 36, 41 (1st Cir. 1989); *Contemporary Mission, Inc.* v. *Famous Music Corp.*, 557 F.2d 918, 928 (2d Cir. 1977); see *United States* v. *Johnson*, 388 F.3d 96, 101-103 (3d Cir. 2004); cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). There is an exception to that rule when the record permits only one possible resolution of the question. Cf. *Pullman-Standard*, 456 U.S. at 292. In that circumstance, a remand would be nothing more than a wasteful exercise. But where the record would permit a district court to exercise its discretion in either direction, the court of appeals must remand to allow the district court to make that judgment call. It may not usurp the district court's function by making a de novo determination of the issue itself. *Vincent*, 874 F.2d at 41; cf. *Pullman-Standard*, 456 U.S. at 292. To the extent the court of appeals sought to exercise such authority, it erred.

2. It is possible that the court of appeals resolved the issue of the admissibility of respondent's other-supervisor evidence because it concluded that, under the correct legal standards, it would be an abuse of discretion for the district court to exclude it. If so, however, the court failed to explain adequately why that would be so.

In deeming the evidence relevant and not subject to exclusion under Rule 403, the court of appeals did not focus on the particular testimony that respondent's proffered witnesses would have given. Instead, the court deemed the evidence relevant and not subject to exclusion under Rule 403 simply because the other-supervisor witnesses were terminated in the same RIF within a year of respondent's termination, were in the group protected by the ADEA, and were subject to similar termination procedures. Pet. App. 9a-10a. In the court of appeals' view, when those considerations are present,

other-supervisor evidence is sufficiently indicative of a policy or atmosphere of discrimination to be relevant to the intent of plaintiff's supervisor, and sufficiently probative of that intent not to be subject to exclusion based on the considerations in Rule 403. *Id.* at 9a-10a, 14a-15a.

Whether or not the court of appeals' approach amounts to a rule of per se admissibility in cases involving a company-wide RIF, as the dissenting judge suggested, Pet. App. 20a, it is not consistent with the standards of admissibility in Rules 401 and 403, and the role of the trial courts as the "primary arbiters of admissibility" (Pet. App. 23a) in considering proffered evidence. While the factors emphasized by the court of appeals are relevant to the analysis under Rules 401 and 403, they do not exhaust the relevant considerations. As previously discussed, other-supervisor evidence can be evidence of a pattern or practice of discrimination that is relevant to the plaintiff's supervisor's intent when it indicates that age discrimination is the employer's standard operating procedure or when it indicates that supervisors in the company or the geographic area or business unit in which the plaintiff's supervisor works view age discrimination as an acceptable option that will be tolerated by the employer. But whether other-supervisor evidence can be probative of either of those inferences depends on the nature of the testimony at issue. Some other-supervisor testimony that falls into the broad category identified by the court of appeals would be sufficient to establish relevance under one of those theories, some would not, and some would require a judgment call by the district court. The court of appeals therefore erred in deeming the evidence relevant simply because it fell into the broad category it identified.

The court of appeals similarly erred in conducting its de novo Rule 403 inquiry without the benefit of any trial court findings or discussion on the matter. Some other-supervisor testimony that falls within the court of appeals' broad category would be so probative that it would not likely be subject to exclusion based on Rule 403 considerations, some would have such marginal probative value that it likely should be excluded, and some would require a judgment call by the district court.

In addition, in considering the likelihood of unfair prejudice, jury confusion, or undue delay, the district court occupies a superior position to gauge the impact of the introduction of the proffered evidence vis-à-vis the other evidence in the case or appropriate trial considerations. This case, for example, has an extensive record and, even without the proffered testimony, resulted in an eight-day trial. The more extensive the record or complicated the case, the better position the district court will occupy to make judgment calls concerning the applicability of the Rule 403 factors and how to weigh those factors.

Thus, the court of appeals either incorrectly believed that it had authority to determine admissibility itself, or it incorrectly believed that it would always be an abuse of discretion to exclude other-supervisor evidence falling into the broad category it identified. Either way, the court erred. Having correctly determined that the district court applied an incorrect legal standard in excluding the evidence, the court of appeals should have remanded the case to the district court for a determination of admissibility under the correct legal standards.

The better course for this Court is likewise to send this case back to the district court to make the requisite evidentiary determinations in the first instance, apply-

ing the legal principles articulated by this Court. Since this Court does not owe any deference to the *court of appeals*' de novo Rule 401 and 403 determinations, affirming or reversing those determinations on the merits would require this Court to engage in its own de novo review of the proffered evidence and the record as a whole to consider the potential impact on the trial of the admission of that evidence. This Court does not customarily perform such a classic trial-court function and there is no particular reason to take on that task here.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2007

APPENDIX

1. Rule 401 of the Federal Rules of Evidence provides:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

2. Rule 403 of the Federal Rules of Evidence provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

No. 06-1221

IN THE SUPREME COURT OF THE UNITED STATES

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

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BRIEFS ON THE MERITS

Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, *et al.*, in Support of Respondent, *Sprint v. Mendelsohn*, No. 06-1221 (U.S. Oct. 19, 2007) 2

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE* [1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 39 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), which Respondent Ellen Mendelsohn alleges Petitioner Sprint/United Management Company violated by terminating her employment because of her age. Vigorous enforcement of the ADEA, pursuant to its congressionally mandated purposes, as well as numerous decisions of this Court and lower federal courts broadly interpreting its provisions, is of paramount importance to AARP, its working members, and the millions of other older workers who have come to rely on it to remedy, deter and eventually eliminate invidious, illegal work place age discrimination.

Amicus AARP urges the Court to seize the opportunity presented by this case to emphatically reject, as did the court below and as most other lower courts have done, the erroneous notion proffered by Petitioner that, in an individual discrimination case, anecdotal evidence of alleged discriminatory treatment of other employees of the defendant-employer is *per se* inadmissible to prove the defendant discriminated against the plaintiff, unless the other employees have the same supervisor as the plaintiff.

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[1] No counsel for any party authored any portion of this brief. No persons other than *amicus curiae* members or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

The Tenth Circuit properly relied on this Court's decisions in *McDonnell Douglas, Reeves* and their progeny, as well as the Federal Rules of Evidence, among other authorities, in reversing a blanket pre-trial exclusion of "other-supervisor evidence" in this case. In doing so, the Tenth Circuit also properly identified categories of anecdotal evidence including "other supervisor evidence," that this Court and the lower federal courts have routinely permitted plaintiffs to use to meet their considerable burden to establish discriminatory intent in individual disparate treatment suits under the ADEA. Petitioner Sprint and its supporting *amicus* would have the Court reinstate the draconian exclusionary rule wrongly imposed by the *Mendelsohn* district court and have it apply in *all* individual ADEA cases, and by logical extension, in *all* employment discrimination cases. That is, Sprint asks this Court to announce a rule that would absolutely bar – despite voluminous contrary precedent in this Court and most others, long-established doctrine underlying federal evidence rules, and compelling circumstances in numerous workplace discrimination cases – *all* anecdotal evidence not demonstrably connected to an employee-plaintiff's own supervisor.

The Respondent and other *amici* supporting her in this case have presented a full account of how this Court's precedents and the Federal Rules of Evidence support a flexible, case-by-case approach to admission of anecdotal evidence, including "other supervisor evidence," in disparate treatment cases under the ADEA and other federal employment discrimination laws. Respondent's Brief on the Merits, *Sprint v. Mendelsohn*, No. 06-1221 (U.S. Oct. 19, 2007); Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law *et al* in Support of Respondent, *Sprint v. Mendelsohn*, No. 06-1221 (U.S. Oct. 19, 2007). In addition, the Solicitor General argues that these

authorities, among others, powerfully support a finding that in many instances, such evidence will be relevant and will not cause undue prejudice to a defendant employer. Brief for United States as *Amicus Curiae*, at 13-25, *Sprint v. Mendelsohn*, No. 06-1221 (U.S., Aug. 20, 2007).

Accordingly, *amicus* AARP focuses below on the lower federal courts' implementation of these authorities in ADEA and other employment discrimination cases, and in particular, rebuts Petitioner's suggestion that lower federal courts generally hold that anecdotal "other-supervisor evidence" (or as Petitioner would have it, "'me, too" evidence") necessarily "sheds [no] light on the motivation of" a plaintiff's supervisor, that is, the "decisionmaker" in a plaintiff's case, Brief for Petitioner ("Pet. Br."), at 21, *Sprint v. Mendelsohn*, No. 06-1221 (U.S., Aug. 20, 2007). *See id.* 21-27; *accord* Brief for Employers Group as *Amicus Curiae* in Support of Petitioner, at 5, *Sprint v. Mendelsohn*, No.06-1221 (U.S., Aug. 17, 2007) ("Testimony about [other] employ[ees'] personal beliefs that they were the victims of discrimination, ageist comments by other supervisors, another supervisor's layoff list, and an[other] employee's belief that another supervisor harassed an unrelated employee provides no insight into [the decisionmaker's] state of mind when he selected [the plaintiff] for layoff"). These assertions not only contradict many rulings of this Court, and the design established by the federal evidence rules, but also the overwhelming weight of lower court authority implementing decisions of this Court.

Like many other lower courts, the Tenth Circuit largely followed the path established by this Court's repeated admonitions, in *McDonnell Douglas, Reeves* and other cases, that in a number of respects, anecdotal evidence may be probative circumstantial proof in individual disparate treatment cases. Based on the ADEA's text, this Court has focused on the

discriminatory intent of *employers*, not just the presence of animus on the part of a specific *supervisor*. And while a supervisor delegated authority to act for the employer may be the principal actor in terminating an individual employee, this Court, and lower courts following its lead, have recognized that such a supervisor's actions adverse to a specific employee may – indeed, likely do – reflect the managerial environs in which she or he works – a "culture" or "atmosphere" of discrimination, "patterns" or "practices" of unequal treatment, or even explicit biased statements by a CEO or other senior manager, conveying that acting on stereotypes and/or bias is tolerated or even encouraged. *See, e.g., McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973) (declaring probative in an individual disparate treatment case evidence of an employer's "general policy or practice" with respect to employees in the same protected category). Thus, it is well-established that anecdotal evidence, including testimony of co-workers with other supervisors, often may significantly inform a factfinder whether an adverse employment action in an individual case reflects discriminatory motive or intent of the employer.

The relevance of circumstantial evidence beyond that of employees who share a common supervisor with the plaintiff is especially great in circumstances like those faced by Respondent, who was discharged as part of a centrally administered employer initiative – a "reduction-in-force" or "RIF" – affecting many more employees: *i.e.*, at the very least those within her entire business unit, and at most, the entire Sprint workforce.

Simply put, the rule advanced by Petitioner and supporting *amici* represents a dramatic retrenchment in employment discrimination law that would result in a severe contraction of the rights and protections conferred by Congress on victims of discrimination. Moreover, if this Court were to place its imprimatur on

the rigid *per se* exclusionary order rejected by the Tenth Circuit, such a decision would fatally compromise the ability of countless plaintiffs to effectively challenge intentional discrimination. *Amicus* AARP respectfully submits that this radical and manifestly unjust proposal is completely unwarranted by the facts of this or any other case. It is wholly unnecessary to supplement measures readily available to trial judges to limit the admission of anecdotal evidence and to control its use. The *per se* exclusionary rule advocated by Petitioner should be forcefully rejected by this Court.

ARGUMENT

In overturning the district court's categorical exclusion of Respondent's anecdotal, "other supervisor" evidence, the Tenth Circuit correctly concluded that "[t]he testimony of the other employees concerning Sprint's alleged discriminatory treatment and similar RIF terminations is 'logically and reasonably' tied to the decision to terminate Mendelsohn." Petitioner's Appendix ("Pet. App.") 9a (citing *Spulak v. K Mart Comp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990)). As the Court of Appeals acknowledged, circumstantial "[e]vidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class." *Id.* at 3a (citations omitted).

The panel also noted that such conclusions are fully consistent with the Federal Rules of Evidence, under which evidence is relevant and admissible unless its probative value is outweighed by concerns of unfair prejudice, confusion or waste of time. *Id.* at 13a-14a (discussing Fed. R. Evid. 401, 403). Thus, in an individual discrimination case, relevant evidence is not, as Petitioner would have it, limited to facts concerning only an employee-victim, a specific supervisory "decisionmaker," and perhaps co-workers

for that same boss. This Court never has mandated, nor should it now endorse such a cramped framework for cases constituting the vast bulk of federal employment discrimination litigation.

To the contrary, this Court has emphatically stated that the ADEA, like Title VII, was designed "as part of an ongoing congressional effort to eradicate discrimination in the workplace." *McKennon v. Nashvile Banner Pub. Co.*, 513 U.S. 352, 357 (1995).[2/] To insure that this purpose one day may be fulfilled, this Court should reject Petitioner's invitation to apply its crabbed notion of relevance, which would devastate the remedial sweep of the ADEA. Rather, this Court should reaffirm its prior rulings to the contrary, and not overrule a multitude of lower federal court precedents applying them.

Because of the rarity of direct evidence of discriminatory workplace bias, because of the myriad influences that may bring about adverse employment actions, and because trial judges have ample tools to evaluate the relevance of anecdotal evidence and, in appropriate cases, to exclude or limit its use, a flexible evidentiary standard governs admission of anecdotal evidence in individual disparate treatment cases. Absent a sufficient justification for exclusion, such evidence, including the anecdotal "other supervisor evidence" challenged by Petitioner, should be admitted on the difficult and central issue of discriminatory intent.

[2/] Indeed, "[t]he ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon*, 513 U.S. at 357. "The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *Id.* at 358 (citation omitted).

I. ANECDOTAL EVIDENCE, INCLUDING "OTHER SUPERVISOR EVIDENCE," IS OFTEN NOT ONLY HIGHLY RELEVANT, BUT ALSO INDISPENSABLE TO AN INDIVIDUAL PLAINTIFF'S PROOF OF DISCRIMINATORY INTENT.

At trial Respondent Ellen Mendelsohn was not afforded "a full opportunity to present her case" that she was selected for termination in a company-wide reduction-in-force (RIF) due to her age, because in a pretrial order the district court excluded testimony of former Sprint employees terminated in the same RIF. Pet. App. 2a.; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.18 (1973). The Tenth Circuit correctly observed that excluding such evidence, via "[b]lanket pretrial evidentiary exclusions, in particular, 'can be especially damaging in employment cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives,'" Pet. App. 14a (quoting *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990)).

A. This Court Never Has Endorsed The Sort Of *Per Se* Rule Of Exclusion Enforced By The District Court In This Case.

In *McDonnell Douglas*, this Court devised the now familiar inferential proof-construct that allows plaintiffs to attempt to prove intent to discriminate through a three-step process. A plaintiff, this Court held, bears the burden of proving pretext, and in doing so must be permitted latitude (amounting to a "full and fair opportunity") to marshall "competent evidence" to that effect, including anecdotal evidence. 411 U.S. at 805 n.18. Such evidence, the Court indicated, might include how the employer treated similarly situated employees other than plaintiff (with

no indication of the "same supervisor" limitation).[3] The Court later clarified that the *McDonnell Douglas* proof-construct "was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Petitioner's proposed *per se* rule, limiting anecdotal evidence in ADEA cases to "single supervisor" evidence, transgresses both *Furnco* and *McDonnell Douglas*. It also violates this Court's admonition in *U.S. Postal Services Board of Governors v. Aikens*, 460 U.S. 711 (1983), against treating the "discriminatory intent" of an employer "differently from other ultimate questions of fact." 460 U.S. at 716. Rather, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves [emphasis supplied]. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent." *Id.* The district court in this case took just the sort of detour of which the *Aikens* Court warned. This Court should rebuff Petitioner's renewed campaign for a restrictive rule little different from the misguided requirement of

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[3] Such evidence also may include proof of the employer's "general policy and practice" with respect to other protected-category employees, not necessarily under the same supervisor or "decisionmaker," as well as "statistics as to petitioner's employment policy and practice," which may "be helpful to a determination of whether petitioner's [treatment of] respondent in this case conformed to a general pattern of discrimination against [other employees in the same protected category]." *Id.* at 804-05.

"direct evidence" of discriminatory intent rejected in *Aikens*.

The lower federal courts have taken this Court's teachings to heart, and an about-face at this point is unwarranted and would disturb settled legal principles. In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), for instance, the court affirmed the admission at trial of evidence of harassment of black workers besides Hunter (as well as a judgment for plaintiff), explaining, "Given the difficulty of proving employment discrimination - the employer will deny it and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles – a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating Rule 403 [of the Federal Rules of Evidence] would be unjustified." *Id.* at 1423. In short, evaluation of evidence in employment discrimination litigation must proceed on a case-by-case basis. The anecdotal, "other supervisor" evidence in *Hunter* "was relevant both in showing that [the employer] condoned racial harassment by its workers and in rebutting [employer's] defense that it had fired [plaintiff] for cause." *Id.*

In a sex discrimination decision issued two decades ago, *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), Judge Posner opined that "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance." *Id.* at 698. Likewise, in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), a race and age discrimination case, the court of appeals recognized that Rule 403 may be used to exclude evidence, but declared that a trial court's "exercise of its discretion must not unfairly prevent a party from proving his case." *Id.* at 1102-03. These rulings reflect a longstanding, settled understanding

that the admissibility of evidence in individual disparate treatment cases under the ADEA and other federal employment discrimination statutes is a matter for careful judgment, case-by-case, and not *per se* rules.

B. Anecdotal Evidence Is Routinely Admitted In Individual Disparate Treatment Cases Because Of The Difficulty of Proving An Employer's Discriminatory Intent.

This Court has long recognized the challenges posed by having to prove discriminatory intent, especially in employment discrimination cases. It has declared "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000), and further, that "[l]iability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision," *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Aikens*, 460 U.S. 711); *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-57 (1981); *Furnco*, 438 U.S. at 576-78. And in *McDonnell Douglas*, this Court acknowledged that anecdotal evidence may be critical to an employment discrimination plaintiff's case, and in particular, on the central issue of pretext: "Evidence that may be relevant to any showing of pretext includes facts as to [the employer's] . . . general policy and practice with respect to minority [protected age group] employment." 411 U.S. at 804-05. Thus, the evidence that the Tenth Circuit held was excluded improperly in this case is precisely the type of proof this Court has deemed not only relevant, but critical to proving a claim of employment discrimination.

This Court also has "[r]ecogniz[ed] that 'the question facing triers of fact in [workplace]

discrimination cases is both sensitive and difficult,' and that '[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes,'" *Reeves*, 530 U.S. at 141, quoting *Aikens*, 460 U.S. at 716. For this reason, "the Courts of Appeals ... have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence." *Id.* at 141. As for what evidence is admissible under the *McDonnell Douglas* burden-shifting scheme, this Court repeatedly has declared: "the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253, and citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 503, 507-08 (1993)).

Lower federal courts have routinely and faithfully acted on this understanding. For instance, in *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990), an individual ADEA case in which the court reversed summary judgment for the employer, the Second Circuit reasoned that "[b]ecause employers rarely leave a paper trail – or smoking gun – attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer." *Id.* at 85. Similarly, in *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) the First Circuit observed that "[D]iscrimination can often be of such a subtle, insidious character that a plaintiff may only be able to offer circumstantial evidence to buttress his or her claim." *Id.* at 597; *see also, e.g.*, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d at 1423 ("Given the difficulty of proving employment discrimination – the employer will deny it, and almost

every worker has some deficiency on which the employer can plausibly blame the worker's troubles – a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating Rule 403 would be unjustified."); *Riordan*, 831 F.2d at 697-98 (7th Cir. 1987) (explaining that proving employment discrimination "is always difficult," because defendants "will neither admit discriminatory animus nor leave a paper trial demonstrating it ... it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative").

II. ANECDOTAL EVIDENCE OF INTENTIONAL BIAS IS ADMISSIBLE IF IT MAY INFORM THE FACTFINDER ABOUT INFLUENCES ON AN EMPLOYER'S ALLEGED DECISIONS ADVERSE TO A PLAINTIFF.

Through five co-worker witnesses in the protected class (age 40 or older), Respondent Mendelsohn sought to establish a pervasive "atmosphere" of age bias at Sprint. Pet. App. 2a. Thus although none of the five had the same supervisor as Respondent, they each were proffered to testify regarding influences on Sprint supervisors generally, including plaintiff's. The Court below concluded that "[a]ge as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." *Id.* at 14a.

The Tenth Circuit reasoned that "[e]vidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class.

Pet. App. 13a (citing *McDonnell Douglas*, 411 U.S. at 804; *Aikens*, 460 U.S. at 713-14 n. 2). This rationale is well supported by rulings of this Court and the lower federal courts.

A. The Court Should Decline To Adopt A Rigid Nexus Requirement For Admission Of Anecdotal Evidence.

The Tenth Circuit correctly held that in an individual employment discrimination case admissibility of anecdotal evidence of an employer's discriminatory intent does not depend on whether it is directly connected with the plaintiff's supervisor. Pet. App. 8a-9a. A rigid "nexus" requirement previously has been rejected by this Court and lower federal courts. Petitioner presents no sound basis for resurrecting such an impractical approach.

In *Reeves*, this Court held that an individual ADEA plaintiff may rely on anecdotal evidence consisting of discriminatory remarks, even when not made in the immediate context of a challenged employment decision, to prove that the employer's stated reason for terminating plaintiff was a pretext for age discrimination. 530 U.S. at 152-53. Finding that the Fifth Circuit "had discounted [the remarks] because they 'were not made in the direct context of Reeves' termination,'" *id.* at 152, this Court rejected the Fifth Circuit's analysis, concluding that a more "commonsense principle" is needed to evaluate such evidence, *id.* at 153-54 (Ginsburg, J., concurring).

Subsequent to *Reeves*, the Fifth Circuit in *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003), explicitly abandoned the strict "nexus" requirements it had earlier imposed in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000), a case decided two weeks before this Court's decision in *Reeves*. In *Wyvill*, the Fifth Circuit

had rejected testimony "from and about former employees in an effort to show that [defendant] . . . had a 'pattern or practice' of discriminating against older workers." *Id.* at 302. Contrary to this Court's subsequent guidance in *Reeves*, the *Wyvill* court reasoned that "[t]his court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge." *Id.* In light of this Court's *Reeves* decision, however, the Fifth Circuit in *Palasota* completely reversed its view of anecdotal evidence:

> *Wyvill* stated that, for an age-based comment to be probative of an employer's discriminatory intent, it must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d at 304. After *Reeves*, however, so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent.

342 F.3d at 577. This history reveals Petitioner's significant reliance on *Wyvill, see* Pet. Br. 23-24, 41-42, to be misplaced.

B. "Nexus" Requirement Affects The Weight, Not The Admissibility Of Anecdotal Evidence.

Long before *Reeves* most courts regularly concluded that lack of a direct nexus between the proffered anecdotal evidence and the disputed employment decision affected the weight of the

evidence, which is determined by the trier of fact, not admissibility, which is for the court to decide. As the Sixth Circuit explained in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998):

> [defendant] argues that discriminatory remarks are irrelevant unless the plaintiff demonstrates a nexus between the discriminatory remarks and the adverse employment action. Although we believe a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant.

Id. at 355. This Court should likewise so rule.

The *Ercegovich* court set aside a trial court's rejection of alleged discriminatory remarks by members of senior management as well as opinions of two Goodyear employees that the company discriminated against the plaintiff on the basis of age. *Id.* at 357. The district court refused to consider these statements on the ground that they did not concern specifically the decisionmaker who eliminated plaintiff's position. *Id.* In ruling this evidence was admissible, the Sixth Circuit explained that "[c]ircumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff." *Id.* at 356. This is a critical link in the chain of reasoning implicit in many other decisions, discussed further below, embracing anecdotal evidence of a corporate "culture" or a corporate "atmosphere" condoning discrimination as probative of the employer's discriminatory intent in an individual disparate treatment case.

While it powerfully justified the admission and consideration of anecdotal evidence of employer bias, the *Ercegovich* court at the same time looked to a fellow tribunal, the First Circuit, in clarifying that admission of anecdotal evidence is not dispositive in a disparate treatment case:

> While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff.

Id. (quoting *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987)).[4]

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[4] This Court has ruled that a plaintiff's anecdotal evidence need not be dispositive to be relevant. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996). Indeed, her burden is merely to provide "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion....'" *Id.* (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977)) (alteration in *O'Connor*; emphasis omitted). In holding that the testimony of the five "other supervisor" witnesses was admissible, the Tenth Circuit acknowledged as much: "The evidence which Mendelsohn seeks to present, 'is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation' for its motive in terminating Mendelsohn." Pet. App. 14a (quoting *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996)); *accord Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997); *see Estes*, 856 F.2d at 1104 ("Evidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself.").

Further, the *Ercegovich* court explained:

> Discriminatory statements may reflect a cumulative managerial attitude among the defendant-employer's managers that has influenced the decisionmaking process for a considerable time. Thus, the management's consideration of an impermissible factor in one context may support the inference that the impermissible factor entered into the decisionmaking process in another context.

Id at 356. To be sure, the Sixth Circuit in *Ercegovich* suggested there may be outer limits to the kind of links a plaintiff may show to justify the admission of – perhaps minimally relevant – anecdotal, circumstantial evidence in a disparate treatment case. Presumably any such limits would vary with circumstances presented in a specific case, including the nature of claims asserted and the form of anecdotal evidence at issue. Thus, in the analogous, yet different context of biased remarks by a corporate executive, the *Ercegovich* court stated:

> We do not mean to imply that any ageist comment by a corporate executive is relevant as evidence of a discriminatory corporate culture. Rather, the courts must carefully evaluate factors affecting the statement's probative value, such as 'the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action.'

Id. at 357 (quoting *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3rd Cir. 1997), *cert. denied,* 522 U.S. 1116 (1998)).

Nevertheless, the Sixth Circuit was emphatic – as *Amicus Curiae* AARP respectfully submits this Court should be – in declaring, "We therefore believe that 'evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." *Id.* at 356 (quoting *Conway*, 825 F.2d at 597, in which the First Circuit rejected a similar "nexus" objection).

Based upon the type of analysis conducted by the court in *Ercegovich*, which the district court failed to do in *Mendelsohn*, the Tenth Circuit properly concluded, and this Court should likewise hold, that the anecdotal evidence at issue in this case was admissible.

C. Evidence Of An "Atmosphere" Of Discrimination Is Probative Of Discriminatory Intent.

This Court has a plethora of lower federal court experience and precedent to draw on should it decide, as *Amicus Curiae* AARP respectfully urges, to reaffirm the broad admissibility of anecdotal evidence of discrimination in individual disparate treatment cases. Many of these authorities approve admission of circumstantial proof of a corporate "atmosphere" conducive to discriminatory decision-making by an employer.

In *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995), the plaintiff, like Mendelsohn, alleged that his termination decision was influenced by a "corporate atmosphere ... unfavorable to older workers." *Id.* at 1213. The Third Circuit reaffirmed that "nondecisionmakers [even if] temporally remote from the decision at issue," may provide some relevant

evidence of discrimination.[5] *Id.* at 1214. Earlier, in *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994), the same court of appeals held that admissible anecdotal evidence of discrimination includes proof "that the employer in the past had subjected [the plaintiff] to unlawful discriminatory treatment, that the employer treated other, similarly situated persons out of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons." *Id.* at 765; *accord Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 641 (3d Cir. 1993) (acknowledging that the atmosphere in which a company makes its employment decision can be circumstantial evidence of discrimination).

Similarly, in *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001), another ADEA case, the First Circuit held the testimony of two former employees relevant to establish a company policy of age discrimination, despite their having different supervisors and working at different jobs in widely separated locations. Plaintiff Cummings, like Respondent Mendelsohn, sought to introduce this

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[5] The court of appeals affirmed a trial court decision to admit testimony of five former employees, as well as a verdict for plaintiff on state law grounds. Despite questions as to the evidentiary value of the co-worker testimony, the Third Circuit panel concluded the evidence was relevant, and that its probative force outweighed its potential prejudicial effect. 50 F.3d at 1215. In reaching this result, the court specifically rejected the employer's arguments that a different result was compelled by *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), on which Petitioner relies, *see* Pet. Br. 22, 44, noting that the *Haskell* court had before it and declined to hear testimony of six former employees because it did not amount to statistically significant evidence of a pattern and practice of discrimination," *Abrams*, 50 F.3d at 1215 n.12. *See Haskell*, 743 F.2d at 121 ("For such statistical evidence to be probative, however, the sample must be large enough to permit an inference that age was a determinative factor in the employer's decision.").

"other supervisor" evidence to show a pattern of age-biased behavior in connection with company-wide corporate restructuring. Cummings, a Massachusetts resident, was terminated after Standard Register acquired UARCO where Cummings had worked for seventeen years. *Id.* at 60-61. Defendant's asserted reason for the termination was that its restructuring eliminated overlapping sales areas; the jury, however, found that Cummings was terminated because of his age. *Id.* at 62.

At trial, plaintiff offered testimony of two former Standard Register employees, "who believed that they also were victims of age discrimination." *Id.* at 61. Weatherly, a field engineer in Nashville, Tennessee, testified that his boss, Perkins, said he would be terminating Weatherly because he and the other employees were "too old to do the job," and because "the older guys and guys like him just didn't have the stamina to keep up with this." *Id.* Talley, a sales representative in Seattle, Washington, testified his supervisor, Campbell, repeatedly told him that Standard Register needed to make room for "young blood." *Id.* The court of appeals was untroubled by absence of a tight geographical or chain-of-command nexus between plaintiff and his witnesses. Rather, the First Circuit found the district court properly exercised its discretion to admit the evidence. Unlike the district court in *Mendelsohn*, the trial court in *Cummings* understood that such evidence of "corporate atmosphere" was "relevant for the purposes of drawing inferences one way or the other." That is, the jury was entitled to hear "what happened at the company in general and what people heard" in order to consider whether "there was an atmosphere that permit[ted] the inference [the plaintiff was] asking the jury to draw." *Id.* at 63.

The failure of the district court in *Mendelsohn* to conduct such an analysis resulted in the improper exclusion of similarly relevant anecdotal evidence of a

tainted corporate atmosphere in which the decision to terminate her was made.

Even when there is some prospect of prejudicial impact, courts should be wary of excluding circumstantial proof of an "atmosphere" of discrimination. In *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988), a race discrimination case, the Fourth Circuit held that under Fed. R. Evid. 403 evidence of racial slurs by ten firefighters who voted on the plaintiff's employment application was admissible, since "the value of these statements in revealing state of mind may still be significant despite the fact that the statements did not relate to the specific decision at issue." *Id.* at 1134. The court explained its Rule 403 balancing process as follows:

> Jury trials are not antiseptic events, and in a case involving racial discrimination, upsetting facts may well emerge. The general policy of the Federal Rules, however, is that all relevant material should be laid before the jury as it engages in the truth-finding process. . . . [C]ourts are obligated to use the power conferred by Rule 403 sparingly, and to remember that the Federal Rules favor placing even the nastier side of human nature before the jury if to do so would aid in the search for truth.

Id. at 1135. Petitioner and its supporting *amici* claim that potential harm to employers' reputations of "other supervisor evidence," however slight, should *always* trump the possibility that such anecdotal proof will be critical to vindication of the fair employment rights of older workers, and by analogy, other workers protected by federal civil rights laws. *Mullen* makes clear how inconsistent with long-established legal standards that position is.

Finally, in *McKenzie v. Carroll International. Corp.*, 610 S.E. 2d 341 (W.Va. 2004), which involved alleged unlawful age discrimination in violation of the West Virginia Human Rights Act, the plaintiff sought to introduce "other alleged acts of age discrimination by [defendant] under Rule 404(b) of the West Virginia Rules of Evidence," which tracks Fed.R. Evid. 404(b). *Id.* at 344. Reversing the trial court's exclusion of such evidence pursuant to defendant's pretrial motion in limine, the West Virginia Supreme Court held "that in an action brought for employment discrimination, a plaintiff may call witnesses to testify about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged." *Id.* at 347.[6] *See Madel v. FCI Mktg., Inc.*, 116 F.3d 1247, 1252-53 (8th Cir. 1997) (evidence of a corporate atmosphere hostile to older employees, together with other evidence, sufficient to establish inference of discrimination). *See also Heynes v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995) (holding that the district court erred in excluding testimony about employer's harassment of other female employees, as such evidence was relevant to prove a discriminatory motive for termination: "It is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group.").

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[6] In *Huddlestone v. United States*, 485 U.S. 681 (1988), this Court pointed out that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence [*i.e.*, '[e]vidence of other ...acts' which may 'be admissible for ... proof of motive'] as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Id.* at 688-89.

D. Evidence Of A Discriminatory Corporate "Culture" Is Probative Of Discriminatory Intent.

Discriminatory hostility that goes beyond a single supervisor, whether evinced in corporate policies or practices, statements by executives or lesser managers, including nondecisionmakers, or implicit in patterns of treatment of multiple workers, all have been found probative and admissible evidence of intentional discrimination in individual disparate treatment cases.

Just a year after *Reeves*, the court in *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87 (2d Cir. 2001), held that remarks by a senior executive about "mak[ing] the image of [the company] younger" and reducing "the average employee age to 39" was probative of age bias. The *Slattery* court reasoned that "[s]tatements about changing the corporate culture made by top executives surely have probative value as to possibly discriminatory acts on the part of the lower level supervisors." 248 F.3d at 93. In reversing an order excluding the statement, the Second Circuit relied on *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), in which a former employee was allowed to testify that a senior vice president of the defendant employer told him that "Westinghouse Credit was a seniority driven company and ... 'I am going to change that.'" 879 F.2d at 54. The Third Circuit explained:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or the watchman.

Id. See Kirsch v. Fleet Street, Ltd. 148 F.3d 149 (2d Cir. 1998) (concluding that remarks, made by a sales manager and company director, over time, both before and after the plaintiff's contested termination, to the effect that the company "wanted younger blood" represented the company's policy and were probative of discrimination); *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1109-10 (5th Cir. 1995) (admitting evidence of ageist statements of supervisors and testimony of former HR employee concerned with impact of RIF on older workers; defendant-employer "contest[ing] the admission of evidence of age discrimination against other employees ... misconstrues the law ... such evidence may be highly probative depending on the circumstances").

But even in cases like *Mendelsohn*, where the proffered testimony is from non-supervisory employees, rather than top management (if only indirectly), lower federal courts have admitted such evidence as probative of corporate "culture" giving rise to an inference the plaintiff's adverse employment action was caused by intentional bias. Thus, in *Rose v. National Cash Register Co.*,703 F.2d 225 (6th Cir. 1983), the court affirmed a verdict for plaintiff and rejected a challenge to testimony by two former co-workers who testified that the defendant-employer, "in connection with its corporate reorganization [including a RIF affecting plaintiff], sought to establish a 'new younger' image for the company." 703 F.3d at 226. While the Court of Appeals declined to characterize this evidence as compelling a judgment for plaintiff, the court insisted that it fully justified presenting Mr. Rose's case to a jury. *Id.* at 227. *See Bevan v. Honeywell, Inc.*, 118 F.3d 603, 606-07, 610 (8th Cir. 1997) (affirming jury verdict for plaintiff based in part on testimony of non-decisionmakers regarding employer's conduct implementing a "youth movement" and holding that, although such remarks "standing alone" were "not sufficient to raise an inference of age discrimination," "[i]n a pretext case, such comments are 'surely the kind of fact which would cause a

reasonable trier of fact to raise an eyebrow'" and further, "provid[e] 'threads of evidence' that are 'relevant to the jury'" (citations omitted).[7]

Finally, in *Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa. 1980), cited by Petitioner, Pet. Br. 25, 40, 44, a case in which the plaintiff alleged a pattern or practice of discrimination against older employees in violation of the ADEA as well as violations of state law, even though the court declined to allow testimony from five former employees of defendant (each of whom was a plaintiff in his own individual lawsuit against Boeing) in plaintiff's case in chief, they were allowed to testify as rebuttal witnesses. Although they were precluded from testifying about their own layoffs, the did provide evidence regarding "the existence of working lifetime employment contracts at Boeing, comments by supervisors concerning age, a purported Boeing policy geared to reducing the age level of the engineering work force, and, a brief background of each witnesses' work history at Boeing." *Moorhouse*, 501 F.Supp. at 393.

E. Anecdotal Evidence Is Especially Critical Where, As Here, The Employer Is Permitted to Present "Other-Supervisor" Evidence of Non-Discrimination.

The Tenth Circuit properly criticized the district court for excluding Respondent's anecdotal "other-supervisor" evidence while permitting Petitioner to present precisely the same kind of evidence, albeit in its own favor. That is, the district court permitted the testimony of Jo Renda, Director of Human Resources, who testified, *inter alia*, about "examples of older employees whom Sprint had retained, even though

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[7] *See also EEOC. v. Century Broad. Corp.*, 957 F.2d 1446, 1457 (7th Cir. 1992) (finding that a supervisor's statements that a radio station wanted "new young sound" supported an inference of age discrimination when considered along with statistical evidence).

they were not supervised by [Respondent supervisor Paul] Reddick." Pet. App. 12a-13a. As a result, "the district court's *in limine* ruling disadvantaged Mendelsohn further [than simply denying her access to relevant affirmative evidence] because Sprint was allowed to portray itself as retaining older employees" while Mendelsohn was not allowed to portray Sprint as disadvantaging other older employees similarly "not supervised by Riddick." *Id.* at 13a.

It is incumbent on the Court to affirm the Tenth Circuit's ruling that it works a fundamental unfairness to the plaintiff in a disparate treatment case when an employer is permitted to present "other-supervisor" evidence, but the plaintiff is not. At the very least both parties must be treated equally.

III. BECAUSE OF THE NATURE OF AGE DISCRIMINATION, BARRING ANECDOTAL OTHER-SUPERVISOR EVIDENCE WOULD ERECT AN INSURMOUNTABLE BARRIER TO OBTAINING RELIEF FOR MANY OF ITS VICTIMS.

In crafting the ADEA, Congress drew heavily on a report by U.S. Labor Secretary W. Willard Wirtz, which Congress had requested when it enacted Title VII of the Civil Rights Act of 1964.[8] Secretary Wirtz's report,[9] "whose findings were confirmed throughout

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[8] Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265.

[9] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965), *reprinted in* U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981).

the extensive factfinding undertaken by the Executive Branch and Congress," *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983), concluded that "[a]lthough age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact," and "the available empirical evidence demonstrated that arbitrary age lines were in fact, generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers," *id.* Over the years, this Court has continued to recognize that unjustified assumptions about the effect of age on the ability to work pose significant problems for older workers. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age."); *Smith v. City of Jackson,*, 544 U.S. 228, 240 (2005) (noting that although age may be relevant "to an individual's capacity to engage in certain types of employment. Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact"); *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 588-89 (2004) (noting that testimony at hearings preceding the passage of the ADEA "dwelled on unjustified assumptions about the effect of age on ability to work" and concluding that "[t]he record thus reflects the common facts that an individual's chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.").

Unfounded assumptions about the effect of age on performance and productivity may, and often do, infect an entire organization. If an executive holds these types of stereotypes about older workers, and directs, or even merely suggests, that the organization's managers and supervisors make employment decisions consistent with such

stereotypes, the testimony of other employees regarding how their own supervisors treated them is clearly relevant to whether there was a company-wide sentiment that older workers were dispensable or less valuable than the organization's younger workers, and that the employer's supervisors were aware of this attitude and acted upon it.

For example, in *Fast v. Southern Union Co., Inc.*, 149 F.3d 885 (8th Cir. 1998) the president of the company "held a number of meetings with key personnel to explain his corporate philosophy." *Id.* at 887. The executive allegedly told his managers that "'Young blood' was needed . . . and [the company] would benefit from a 'fresh new look'; he preferred a younger work force because older workers tend to 'stagnate'; the 'older work force was pulling the company down'; 'younger workers' were the future of the company; '[the company] was a good place to work for six or seven years, not over ten'; and he preferred a younger work force because they are 'more inquisitive' and have 'more energy.'" *Id.* at 887-88. The *Fast* case is not an anomaly. There are numerous other examples of age discrimination cases where managers and supervisors were informed of comparable "corporate philosophies."[10] Denying other-supervisor

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[10] *See, e.g., Lockhart v. Westinghouse Credit Corp.*, 879 F.2d at 55 ("when a major corporate executive speaks, 'everybody listens' in the corporate hierarchy"); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F. 3d 326, 333-34 (3d Cir. 1995) (finding the CEO's statement that "two of our star young men are in their mid-40s. That group is our future" in a company newsletter was deemed circumstantial evidence of the employer's managerial policy and relevant to show the corporate culture in which a company makes its employment decisions); *Bevan v. Honeywell, Inc.*, 118 F.3d at 606-07, 610 (holding that corporation's "revitalization campaign" where a human resources memo directed supervisors to identify younger promising talents with potential, combined with a letter from an executive referencing "young high talent," demonstrated a company policy to weed out older employees and replace them with younger employees); *Slattery v. Swiss Reinsurance Am.*

evidence to victims of workplaces infected with such bias would make it unnecessarily and unfairly difficult – if not impossible – for them to prove their claims.

Indeed, research has demonstrated that individuals have a tendency to respond to subtle signals that are imbedded in daily interactions with others, and often attempt to bring their behavior into conformity with the norms these signals suggest. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discriminating in Multi-Actor Employment Decision Making*, 61 La. L. Rev. 495, 535-36 (2001). This type of behavior is even more powerful in the workplace, where being perceived as a "team player" is important to career success. *Id.* It follows that if the leaders of a corporation push a certain image, such as one of youth, this will have an effect on middle and lower management's attitudes about age, which will in turn affect their employment decisions. *See Hamblin v. Alliant Techsystems, Inc.*, 636 N.W. 2d 150, 154 (Minn. Ct. App. 2001) ("Discrimination is often the result of subtle, unconscious predispositions. Corporate discrimination does not occur in a vacuum. Discrimination feeds on the actions and statements of those involved in the corporate culture.").

As this Court recognized, one "commonplace conception of American society in recent decades is its character as a 'youth culture' . . . a world were younger is better . . . ." *Cline*, 540 U.S. at 591. If, as the Petitioners urge, all evidence of other-supervisor evidence is barred, older workers who must labor in work places where "younger is better" will face an insurmountable hurdle to proving their claims.

Corp., 248 F.3d at 93 (company chairman's statements in a magazine interview that he intended to make the image of the cony younger and had already reduced the average company age had probative value as to possible discriminatory acts by lower level supervisors).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below and hold that relevant anecdotal evidence of discrimination is admissible in an individual discrimination case absent a sufficient reason to exclude it.

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SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes.[1] Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the Nation's business community.

The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, *Federal Express Corp. v. Holowecki*, *cert. granted*, 127 S. Ct. 2914 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, *cert. granted*, 127 S. Ct. 852, *cert. dismissed*, 127 S. Ct. 1931 (2007); *Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006); and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

The Chamber's members have a substantial interest in this case, which will affect the course of the thousands of employment discrimination lawsuits filed in the federal

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

courts each year. *See, e.g.*, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166 (14,353 employment cases commenced between Sept. 30, 2005 and Sept. 30, 2006). The issue presented here—whether a district court may admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff—is of great importance.

In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for the Chamber's members, and all employers, because that rule dramatically expands both the scope of liability and the costs and potential unfairness of employment discrimination litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. At its core, this case is about whether, in an individual disparate-treatment lawsuit, a company's liability may turn on allegations of discrimination made by non-parties. Unless such non-parties are similarly situated to the plaintiff (for example, if they share the same supervisor), the testimony of these other employees can never be relevant, for there is no logical connection between the employment decision the plaintiff is challenging and the decisions affecting the non-party witnesses. Because of this lack of connection, such evidence has no probative value. If non-party testimony is nonetheless admitted into evidence, there is a very real risk that employers will be held liable not only (or, indeed, not at all) for their conduct with respect to the plaintiff, but rather for alleged discrimination towards persons not before the court. As a result, such a rule would in effect alter the scope of liability under the federal anti-discrimination laws.

2. Even if this Court determines that non-party testimony has some marginal relevance, such evidence will almost always be inadmissible under Rule 403 of the Federal Rules of Evidence. "Me, too" evidence raises red flags as to nearly

every relevant consideration in the Rule 403 analysis. It is unfairly prejudicial because it tars defendants with alleged discrimination towards persons other than the one who brought the lawsuit. It confuses the issues in the case by distracting juries from the core question of whether the ***plaintiff*** was subjected to a discriminatory decision and instead focusing attention on other actors. And it makes employment discrimination cases more time consuming and more costly. Trials will grow in size and complexity as employers will be forced not only to defend the claim being litigated, but also to refute the allegations of all of the non-party employees who have been called to recite their own allegations of discrimination—and they will have to do so in case after case in which this traveling show of witnesses is called upon to perform.

3. Moreover, to admit such "me, too" evidence would encourage juries to punish employers for conduct directed at non-parties. The prejudice and harm that results from allowing juries to consider conduct that bears no relevance to the plaintiff's own claims implicates due process concerns of the type most recently recognized by this Court in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). As in the punitive damages context, fundamental fairness requires that employers not be subjected to an unreasonable risk of being held liable or punished because of conduct directed at non-parties.

4. If embraced by this Court, the Tenth Circuit's rule also would force companies to adopt inefficient, centralized management practices. Any employee's allegation of discrimination—whether true or simply perceived—could make its way into lawsuits filed by other employees, regardless of whether the alleged events are connected. In response, companies can be expected to centralize employment-related decisions rather than to delegate authority to those managers who are best situated to make the decisions, so that they can avoid the risk of a rogue supervisor's misconduct having a domino effect on lawsuits involving completely different supervisors. The Tenth Circuit's overbroad rule creates a justi-

fiable fear of liability that will encourage the adoption of bureaucratic and inefficient management practices.

ARGUMENT

I. Testimony By Non-Party Employees Who Allege That They Were Discriminated Against Is Inadmissible In Individual Disparate-Treatment Lawsuits.

In employment discrimination lawsuits, it is routine for individual plaintiffs to try to buttress their cases by proffering the testimony of other employees who allege that they, too, were the victims of discrimination. In rare cases such testimony may be appropriate, such as when the plaintiff and a non-party employee were terminated by the same decisionmaker. But much more commonly—as here—the plaintiff and the other employee are not similarly situated. Rather, the other employee works in a different department, does different work, and reports to a different supervisor. *See, e.g.*, Pet. Br. 4–5 (noting that none of the five proffered witnesses worked in the same group or within the same supervisory chain as Mendelsohn). Under such circumstances, the non-party's testimony should be excluded.

A. "Me, Too" Evidence Is Irrelevant In The Context Of Individual Employment Claims.

1. This Court has repeatedly explained that, in employment discrimination lawsuits, the question is whether the employer has made an adverse employment decision because of discriminatory animus towards the plaintiff. Hence, under the ADEA, when "a plaintiff alleges disparate treatment"—as here—"'liability depends on whether the protected trait * * * actually motivated the employer's decision.' * * * That is, the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (brackets in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)); *accord, e.g., Price Waterhouse v. Hopkins*, 490 U.S.

228, 241–242 (1989) (plurality opinion) ("Congress meant to obligate [a plaintiff] to prove that the employer relied upon sex-based considerations in coming to its [employment] decision").

This Court has further recognized that employers make these decisions indirectly; that is, they act through their agents—and more specifically, through supervisors charged with making such decisions. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) ("The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.").[2]

Thus, in an individual disparate-treatment case, the fundamental questions are (1) who made the decision and (2) whether that decisionmaker was motivated by discriminatory intent. *See generally* Pet. Br. 11–19 (discussing cases).

2. As to these questions, claims of discrimination by employees ***other*** than the plaintiff are irrelevant. Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is ***of consequence to the determination of the action more probable*** or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). "Whether or not a fact is of consequence is determined not only by the rules of evidence but by substantive law as well. * * * If the evidence is offered to prove a fact ***not in issue under substantive law*** then * * * it is * * * ***not relevant*** under Rule 401." 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 401.04(3)(b) (2d ed. 2007) (emphasis added).

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[2] *See also Braswell v. United States*, 487 U.S. 99, 110 (1988) ("Artificial entities such as corporations may act only through their agents"); *CFTC v. Weintraub*, 471 U.S. 343, 348 (1985) ("As an inanimate entity, a corporation must act through agents.").

Here—as "in every employment discrimination case involving a claim of disparate treatment"—"[t]he ultimate question * * * is whether the ***plaintiff*** was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153 (emphasis added). Therefore, for evidence to be relevant in such cases, it must bear on whether the supervisor who made the employment decision affecting the plaintiff did so because of discriminatory intent.

The non-party testimony that Mendelsohn sought to introduce does not come close to meeting that test. To be sure, the testimony of each of the other Sprint workers relates to whether the ***testifying*** worker was adversely affected for discriminatory reasons. But even assuming that some or all of these employees were actually the victims of discrimination, such facts are not "of consequence to the determination of [Mendelsohn's] action" (Fed. R. Evid. 401) because they have no logical connection to whether ***Mendelsohn's*** supervisor terminated ***her*** because of her age. *Cf., e.g., Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) ("Since the testimony of the six former Company officers as to the circumstances of their terminations and those of other Company officers was insufficient to show a pattern and practice of discrimination, it was ***not relevant*** to the question of whether [plaintiff] Haskell was terminated for age-related reasons.") (emphasis added).

3. In nevertheless holding that the district court was required to admit the testimony of the five former Sprint employees, the court of appeals relied on faulty reasoning. In the court's view,

> the other employees' testimony is logically tied to ***Sprint's*** alleged motive in selecting Mendelsohn to the RIF. Although Mendelsohn and the other employees worked under different supervisors, Sprint terminated all of them within a year as part of an ongoing company-wide RIF. All the employees were in the protected age group, and their selection

> to the RIF was based on similar criteria. Accordingly, testimony concerning the other employees' circumstances was relevant to ***Sprint's*** discriminatory intent.

Pet. App. 9a–10a (emphasis added).

But this analysis is mistaken: It rests on the deeply flawed premise that the (allegedly) discriminatory intent of one supervisor is logically connected to the state of mind of other supervisors—and in particular, the supervisor who made the decision at issue in an individual lawsuit. That only makes sense if—contrary to all reason and experience—a corporation possesses a "collective intent" that can be divined by aggregating the states of mind of multiple unconnected supervisory employees. It is precisely that misconception that is at the core of the Tenth Circuit's ruling, which speaks of:

- "***Sprint's*** discriminatory animus toward older workers";
- "the employer's ***general*** discriminatory propensities"; and
- an "***atmosphere*** of age discrimination."

Pet. App. 5a, 14a (emphases added).

Yet allegations of discrimination in the air—like "'[p]roof of negligence in the air'"—"'will not do'" (*Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.) (quoting POLLOCK, THE LAW OF TORTS 455 (11th ed. 1920)). As Judge Tymkovich recognized in his dissent, "[g]iven the size of Sprint, the fact that Mendelsohn found five former employees who believed [that] they were victims of age discrimination is not meaningful until a specific ***evidentiary foundation*** has been laid"—*i.e.*, "independent evidence showing that Sprint had company-wide discriminatory policies." Pet. App. 20a (emphasis added). By reaching a contrary conclusion and holding that the five employees' distinct allegations of discrimination provide that

foundation, the court of appeals made an unwarranted inferential leap.[3] Rule 401 requires more—specifically, a logically supportable connection rather than generic speculation. Because the testimony of non-party witnesses who are not similarly situated to an individual plaintiff lacks that connection, it is irrelevant, and this Court should hold it inadmissible. *See* Fed. R. Evid. 402 ("[e]vidence which is not relevant is not admissible").[4]

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[3] To support its conclusion that non-party testimony is admissible to establish that an employer has "general discriminatory propensities" (Pet. App. 5a), the Tenth Circuit cited this Court's statement that an employer's "general policy and practice with respect to minority employment" "may be relevant to any showing of pretext." Pet. App. 6a (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)). But the next sentence in *McDonnell Douglas* clarifies that "***statistics*** as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805 (emphasis added). It is accordingly Judge Tymkovich's ***dissent*** that accords with *McDonnell Douglas*. *See* Pet. App. 20a (noting the "lack of any statistical or other direct evidence that supports an inference of enterprise-wide discrimination").

[4] Such a holding would not derail cases in which a plaintiff alleges a "pattern or practice" of discrimination—cases that are most commonly brought as class actions. *See* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 44 n.168 (3d ed. 1996) ("Pattern-or-practice suits, by their very nature, involve claims of classwide discrimination"). As this Court has observed:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be

B. Even If "Me, Too" Evidence Has Marginal Relevance, Federal Rule Of Evidence 403 Generally Requires Exclusion Of Such Evidence In Individual Disparate-Treatment Cases.

As petitioner observes, Rule 403 provides an independent ground for holding that the testimony of non-parties alleging discrimination is inadmissible. *See* Pet. Br. 39–45. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. When the "me, too" witnesses are not similarly situated to the plaintiff in an individual disparate-treatment case, the balancing required by Rule 403 will virtually always require exclusion of the "me, too" testimony.

1. It is predictable—indeed, highly likely—that the admission of "me, too" evidence will visit unfair prejudice on defendants. In every employment discrimination lawsuit in which such evidence is introduced, the company will be put on trial not only for its actions towards the plaintiff herself, but also for how it treated any other employee who testifies that he or she was a victim of discrimination. No longer would a plaintiff's claim stand or fall on its own merits. Rather, the fates of the plaintiff's claim and the employer's defense would each be inextricably linked to other employees' separate claims.

Moreover, by force of numbers, the employer would be placed at a distinct—and perhaps insuperable—disadvantage. The plaintiff's own case, no matter how weak, will be

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on individual hiring decisions, but on a pattern of discriminatory decisionmaking."

Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 876 (1984) (quoting *Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977)).

strengthened significantly by the vivid, passionate allegations of discrimination recited by other employees of the company. That will be the case regardless of the merits of the non-parties' allegations. Despite the lack of connection to the plaintiff's own claims, the steady drumbeat of allegations of discrimination will have the foreseeable effect of reinforcing the plaintiff's claim, thereby unduly prejudicing the employer. What jury could refrain from thinking that there must be a fire, when so much smoke is thrown up? Thus, as one district judge explained in a frequently cited opinion, even the "strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980) (table).

2. Relatedly, it is a veritable certainty that the introduction of testimony by non-party witnesses will confuse and mislead juries. Employers will be forced to square off not against the plaintiff herself, but rather against a "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.) (recognizing procedural unfairness of having to defend against a class action involving "fictional composite" plaintiff).[5] These concerns are even greater in the context of an individual lawsuit that—as

[5] Describing concerns similar to those expressed in *Broussard*, Judge Posner has explained: "In effect the appeal asks us to graft [one named plaintiff's] timely filing with the EEOC onto [another named plaintiff's] untimely but not-yet-shown-to-be-unmeritorious discrimination case to create a composite plaintiff to represent the class of blacks denied employment by the defendant. We cannot find any basis in law or good sense for such ghastly surgery. Neither plaintiff is a suitable class representative, and zero plus zero is zero." *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999).

here—does not allege a "pattern and practice" of discrimination. *See also* note 3, *supra*. The decision below invites the same type of logically unconnected comparisons, by allowing an individual plaintiff to bolster her case with facts from other incidents involving other decisionmakers.

3. Furthermore, admitting the testimony of non-party employees will poorly serve judicial economy. The practical consequence of the Tenth Circuit's rule, which calls for the routine introduction of such evidence, will be to make employment litigation more protracted and expensive.[6] A company will be forced to refute the allegations of every non-party witness who claims to be the victim of discrimination. Indeed, even a small contingent of former employees who claim discrimination would take on outsized importance at trial.[7] To place these complaining witnesses in their proper context vis-à-vis the entire workforce, an employer would need to offer its own witnesses to testify about the decision-making process for each and every "me, too" witness, as well as for the many employees affected by the job action who have not claimed to have been victimized by discrimination. And it might also need to introduce evidence about the individuals within the protected class who were not affected by the job action. Conceivably, a company could—and perhaps

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[6] In describing the potential impact of this case, one law firm that specializes in employment defense noted: "The real issue – will we have 10 day jury trials or 60?" Hanna, Brophy, MacLean, McAleer, & Jensen, LLP, *U.S. Supreme Court will be final arbiter of "me-too" evidence in discrimination trials*, at http://www.hannabrophy.com/index.cfm?fuseaction=content.contentDetail&ID=8630&tID=297 (last visited Aug. 17, 2007).

[7] The facts in this case are illustrative. The plaintiff hand-picked five witnesses who were prepared to testify that they were discriminated against by other decisionmakers at Sprint. These individuals were needles in the haystack of approximately 15,000 employees who were released by Sprint as part of a series of reductions in force over an 18-month period. Pet. Br. 2.

should—offer such testimony from dozens of its current and former employees. But even that might not suffice to counter the indelible impression created by a handful of non-party witnesses who accuse the company of discriminating against them.

Of course, such proceedings would take a long time. Yet most civil trials are conducted under strict time limitations, and for good reason: most civil juries don't have the time or patience to sit through a trial of three months or longer. But that is what would be required for a defendant to have a reasonable chance of rebutting the array of inflammatory allegations of discrimination that plaintiffs will seek to unleash via non-party proxies.

Moreover, even if district courts could give defendants the time they would need to respond to multiple charges of discrimination—and it is hard to see where courts would find the time—it would place defendants between a rock and a hard place. It is common sense that, by responding to each non-party's allegations of discrimination, a defendant risks dignifying them in the eyes of the jury. The choice a defendant would face—between (1) defending against every accusation thrown at it, which risks suggesting to the jury that the defendant has something to be concerned about, and (2) making what amounts to a general denial, which risks causing the jury to conclude that the defendant has no good defense of its practices—tilts the litigation playing field dramatically and unjustifiably in favor of the plaintiff.[8]

This imbalance will have another deleterious effect: Employers will be forced to settle even meritless lawsuits. As we

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[8] As one practitioner has explained, "if such ["me, too"] testimony is admitted, the defendant would have the Hobson's choice of defending each situation or leaving the testimony unrebutted, either of which is prejudicial." Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 829 (1999).

have noted, if "me, too" witnesses are allowed to testify, trials will become bloated and expensive affairs, and consequently the cost to litigate a trial that goes on for weeks could approach or exceed the damages that a plaintiff might receive. *See, e.g.*, 42 U.S.C. § 1981a(b)(3)(D) (limiting compensatory damages that can be awarded under Title VII against large employers to $300,000). In other words, even if an employer prevails at trial, in a sense it still loses because of the substantial expense necessary to defend itself. That is especially so because prevailing defendants in employment discrimination cases almost never recover attorneys' fees. For example, under Title VII, attorneys' fees may not be awarded to a prevailing defendant unless there is a "finding that the plaintiff's action was frivolous, unreasonable, or without foundation" or that the "plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–422 (1978); *see also Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 594 (7th Cir. 1997) (Easterbrook, J.) ("Fee-shifting provisions in the civil rights laws are asymmetric. Prevailing plaintiffs recover their fees routinely, while defendants recover only if the plaintiff's claim is frivolous.").[9] Hence, plaintiffs will have leverage to demand—and often will receive—sizeable settlements in even the weakest of cases, because the costs of litigating against both a plaintiff and her "me, too" witnesses will simply be too high.

* * * * *

As a categorical matter, the costs from admitting non-party testimony "substantially outweigh[]" the minimal—if any—probative value from that evidence. If the Court does

[9] *Cf. Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir.) (citing cases and holding that "a district court may award attorneys' fees to a prevailing ADEA defendant only upon a finding that the plaintiff litigated in bad faith"), *cert. denied*, 525 U.S. 962 (1998).

not hold that such evidence is irrelevant (*see* Part I(A), *supra*), it should hold that such evidence virtually always fails Rule 403's balancing test.

II. Allowing Non-Parties To Testify About Alleged Discrimination Raises Concerns About Fundamental Fairness Because Such Testimony Invites Juries To Base Liability On Perceived Harms To Persons Other Than The Plaintiff.

To allow the introduction of "me, too" evidence is troublesome for the additional reason that it invites juries to impose liability for alleged harms to parties not before the district court—thereby threatening companies' right to a fair trial. Just last Term, this Court explained in a related context that "fundamental due process concerns" are raised when a jury "use[s] a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063, 1064 (2007). In particular, the Court noted three concerns: the "risks of arbitrariness, uncertainty and lack of notice." *Id.* at 1063. Here, those concerns are, if anything, heightened because the plaintiff seeks to prove her ***own*** cause of action by reference to alleged acts directed at others. Petitioner does not frame the issue in Due Process terms, and the Court can resolve this case under the Federal Rules of Evidence without resort to constitutional grounds. Nevertheless, it remains "important for a court to provide assurance that the jury will ask the right question, not the wrong one." *Id.* at 1064. Yet the rule announced below—and for which Mendelsohn presumably will advocate—virtually ensures that juries will ask, and answer, the wrong question. Rather than focusing on the merits of the specific allegations of the plaintiff at hand, juries are invited to base their finding of liability and "punish [a defendant] for harm caused [to] strangers [to the litigation]." *Id.*

This Court did hold in *Williams* that, in the context of assessing punitive damages, evidence of harm to others aris-

ing from ***the same conduct*** "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* But evidence of ***different*** conduct aimed at nonparties has no role to play in setting punitive damages (*see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–423 (2003)), much less in determining liability in individual disparate-treatment cases. In such cases, the plaintiff does not—and cannot—claim that the employer's decision was part of a single course of conduct that "posed a substantial risk of harm to the general public" (*Williams*, 127 S. Ct. at 1064). Rather, the plaintiff's claim relates only to herself; her purpose in offering evidence of distinct conduct directed at others is to lighten the burden of persuading the jury that there was discrimination against her. Therefore, any jury that considered this evidence would be doing precisely what *Williams* forbids: "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

By insisting that other employees' allegations of discrimination be placed front and center before juries—no matter how attenuated the link to the plaintiff—the Tenth Circuit mandated a "procedure[] that create[s] an unreasonable and unnecessary risk of [jury] confusion occurring." *Id.* at 1065. For the reasons we have explained, that risk is both very real and wholly unnecessary.

III. Allowing The Use of "Me, Too" Evidence Will Force Companies To Adopt Less Efficient Management Practices.

If the rule announced by the court of appeals were adopted, businesses would be required to react to the prospect of increased liability that attends the widespread admissibility of "me, too" evidence by adopting burdensome, less effective management practices.

A. Although framed as an evidentiary holding, the Tenth Circuit's rule effectively alters the substantive grounds

for liability under the employment discrimination laws. Under that rule, the outcome of employment lawsuits no longer turns on whether a decision concerning the ***plaintiff*** was made for a discriminatory reason. Instead, a company must assume that it will be held liable if a jury believes that ***any*** of the proffered witnesses was subject to a discriminatory decision.

This pattern will repeat: Any former employee who believes that he was a victim of discrimination could testify not only at his own trial but also in any other employment case brought against his former employer. And, for the reasons we have explained, a chorus of such allegations—whether or not they are true—will create a substantial risk that the employer will be held liable regardless of whether the plaintiff was herself subjected to a discriminatory decision. In other words, juries may well mulct companies not because they have discriminated against particular plaintiffs, but rather because companies have failed to root out all (allegations of) discrimination. And that being so, it is predictable that plaintiffs and their counsel will file more—and less meritorious— lawsuits secure in the knowledge that they can bolster their cases with the allegations of other employees.

B. If "me, too" evidence is admissible, then any employee's allegations of discrimination will likely have ripple effects in many other discrimination lawsuits.

Many companies will therefore consider themselves compelled by the potential for expanded liability and litigation costs to engage in "defensive medicine" in an effort to avoid any risk that any of its employees will later ***allege*** discrimination.[10] For example, it is predictable that some com-

[10] Even without the added burden of "me, too" evidence being admissible *per se*, as the Tenth Circuit's rule would require, companies already have trouble terminating problem employees. As one recent article explained, "[m]any companies today are gripped by a fear of firing. Terrified of lawsuits, they let unproductive employ-

panies will give up entirely on making performance-based determinations and instead will embrace an economically inefficient "last hired/first fired" approach. Others may feel compelled to centralize their employment decisions, removing authority and responsibility from on-the-ground managers, in the hope of ensuring that thousands of decisions are not tainted by the poor judgment of a single supervisor somewhere in the country or world.[11]

That result runs counter to the long-recognized management principle that decentralized decisionmaking is preferable. It makes sense to vest authority in mid- and lower-level managers who are most closely acquainted with the nature of their work, the needs of their projects, and the skill sets of their team members. As one Nobel Prize winning economist observed over four decades ago, "individual managers will inevitably know more about their own spheres of activity than higher officials"; accordingly, "decentralization can improve the allocation of responsibility" because a "subordinate has greater possibilities of initiative" while "his successes and failures can be more easily recognized by top management." Kenneth J. Arrow, *Control in Large Organizations*, 10 MGMT. SCI. 397, 400 (Apr. 1964). In short, decentralized decisionmaking is more nimble and hence more likely to produce better, more efficient outcomes. But the use of such highly effective management practices will be threatened if

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ees linger, lay off coveted workers while retaining less valuable ones, and pay severance to screwups and even crooks in exchange for promises that they won't sue." Michael Orey, *Fear of Firing: How the threat of litigation is making companies skittish about axing problem workers*, BUS. WEEK (Apr. 23, 2007), at 54.

[11] A number of large companies may face significant difficulties in making the transition to centralized personnel decisionmaking. Indeed, it may be impossible for some large companies to do so because of the size of their operations, which are often nationwide, if not transnational, in scope. These companies may have no choice other than the "last hired/first fired" method.

this Court sustains the Tenth Circuit's broad extension of substantive liability under the discrimination laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council, the National Federation of Independent Business Legal Foundation and the Society for Human Resource Management respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Sprint/United Management before this Court.[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. SHRM's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affili-

ated chapters in the United States, as well as offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other employment-related statutes and regulations. As potential defendants to lawsuits claiming age discrimination under the ADEA, *amici's* members have a direct and ongoing interest in the issue presented before this Court concerning the circumstances under which a trial court must admit, in an individual disparate treatment employment discrimination case, the testimony of non-party witnesses regarding alleged discrimination they, too, suffered at times and by individuals not implicated in the matter being litigated. The Tenth Circuit below, in a divided opinion, ruled the district court committed reversible error by excluding this so-called "me, too" evidence, even though the proffered testimony would come from individuals who are not similarly situated to the plaintiff and thus whose stories of discrimination were irrelevant to whether the plaintiff herself was subjected to unlawful age bias.

Amici have an ongoing interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of their significant experience in these matters, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Ellen Mendelsohn was employed by Petitioner Sprint/United Management Company (Sprint) from 1989 until November 2002, when she was laid off as part of a company-wide reduction-in-force (RIF). Pet. App. 2a. Mendelsohn, who worked in Sprint's Business Development Strategy Group, was selected for layoff after her immediate supervisor

assessed her performance as the weakest among her peers within the unit. Pet. 2. Over the course of eighteen months, approximately 15,000 employees were terminated nationwide by Sprint as a result of the RIF. *Id.*

In April 2003, Mendelsohn filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), claiming her selection for layoff was motivated by age. *Id.* After the EEOC dismissed her charge, Mendelsohn brought an action in the United States District Court for the District of Kansas, alleging disparate treatment discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* *Id.* Although Mendelsohn initially alleged Sprint had engaged in a pattern and practice of age discrimination, she abandoned that claim well prior to trial. *Id.*

In an effort to bolster her individual discrimination claim, Mendelsohn sought to introduce the testimony of five former Sprint employees who were prepared to testify that they, too, had been subjected to unlawful age bias by Sprint. Pet. App. 2a. Sprint filed a motion *in limine* seeking to exclude the testimony, pointing out that the five former employees were not similarly situated to Mendelsohn, since they all were terminated in layoff decisions made by different supervisors, in different locations, and at different times. Pet. 3. The district court granted Sprint's motion, in part, excluding the testimony of the five former employees, *id.*, and limiting Mendelsohn's evidence to "Sprint employees who are similarly situated to her." Pet. App. 3a. At the conclusion of an eight-day trial, a jury returned a verdict in Sprint's favor. Pet. App. 4a.

Mendelsohn appealed to the Tenth Circuit, which reversed and remanded the case for a new trial. Pet. App. 2a. A divided panel held that the district court committed reversible error by excluding the testimony of the five non-party witnesses, as in its view the evidence was "relevant to Sprint's

discriminatory animus towards older workers." Pet. App. 5a. Mischaracterizing Mendelsohn's claim as one alleging a pattern and practice of discrimination ("plaintiff claims to be a victim of a *company-wide* discriminatory RIF"), Pet. App. 9a, the court found, "[a]ge as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." Pet. App. 14a (footnote omitted). It thus concluded the testimony of the five non-party witnesses is "logically or reasonably tied to the decision to terminate Mendelsohn." Pet. App. 9a (citation and internal quotation omitted).

Dissenting, Judge Tymkovich would have affirmed the district court's order excluding the "me, too" evidence, not only because "the proffered testimony from other employees failed to satisfy the relevance and prejudice requirements of Rule 403," but also because Mendelsohn "has made no independent showing of a company-wide policy of discrimination." Pet. App. 17a. He remarked that the panel majority's ruling "suggests even the most tangentially relevant and prejudicial testimony by former employees is *per se* admissible." Pet. App. 23a. Thus in his view, the district court did not abuse its discretion in excluding the proffered testimony.

Sprint petitioned this Court for a writ of certiorari, which was granted on June 11, 2007.

SUMMARY OF ARGUMENT

Under the Federal Rules of Evidence, only "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is admissible at trial. Fed. R. Evid. 401. The testimony of nonparty witnesses regarding alleged discrimination they, too, suffered at times and by individuals not implicated in the

matter being litigated – offered to bolster the intentional bias claim of a single individual – simply is not relevant and thus should *never* be allowed as evidence of discrimination.

In the absence of credible evidence of a systemic, pattern and practice of discrimination, the focus in determining whether an individual plaintiff was subjected to unlawful bias must be on the motives, conduct and actions of the actual decision maker, not on whether or not others within an organization unconnected to the challenged employment decision harbor a discriminatory animus. Since the decision below creates a *per se* rule depriving district courts of the discretion to exclude irrelevant testimony offered by non-party witnesses regarding the alleged discriminatory misdeeds of individuals not even tangentially related to the challenged individual employment decision, it is erroneous and should be reversed by this Court.

The Tenth Circuit's decision, by essentially treating remote and unrelated actions of supervisors not responsible for the challenged employment decision as a "common practice," also will undercut employers' ability to maintain decentralized management structures. Creative litigants could easily string together unrelated personnel practices and decisions to form nationwide classes of thousands or millions of employees under the evidentiary rule articulated below. Employers facing such claims may have little choice but to cut their losses through settlement, whether or not they have done anything wrong.

An additional, unfortunate consequence of the decision below is that employment litigation likely will increase in cost, frequency and duration, particularly against large employers who are most vulnerable to claims of "me, too" discrimination. It also is likely to encourage employees to file frivolous lawsuits, knowing they automatically will be permitted to introduce "me, too" testimony to bolster their own allegations of bias. In addition, allowing "me, too"

evidence as proof of discrimination in an individual disparate treatment case puts employers in the untenable position of having to defend each case as if it were alleging a company-wide pattern and practice of discrimination, regardless of whether the actual plaintiff has made, or has laid a sufficient evidentiary foundation for, such a claim.

ARGUMENT

I. THE PROFFERED TESTIMONY OF NON-PARTY WITNESSES THAT THEY, TOO, WERE THE VICTIMS OF AGE DISCRIMINATION IS NOT PROBATIVE OF WHETHER A SINGLE PLAINTIFF WAS SUBJECTED TO INTENTIONAL AGE BIAS WHERE NO PATTERN AND PRACTICE HAS BEEN ALLEGED

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that is not relevant is inadmissible. Fed. R. Evid. 402.

While evidence of other alleged discriminatory conduct generally is relevant in cases alleging a company-wide pattern and practice of intentional discrimination, it is not probative of potential bias against a single plaintiff claiming she was treated less favorably by the decision maker as a result of her age. As this Court has observed:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will

> not be on the individual . . . decisions, but on a pattern of discriminatory decisionmaking.

Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.10 (1989) (quotations and citations omitted).

In an individual disparate treatment case, the focus of the inquiry thus must be on the motives, conduct and actions of the actual decision maker, not on whether or not others within an organization unconnected to the challenged employment decision harbor a discriminatory animus. "A plaintiff must establish 'some causal relationship' to show 'the significance of [decision makers'] non-contemporaneous statements, or statements made by persons other than the relevant decision maker, to the resolution of the ultimate issue of intentional discrimination.'" *Wittenburg v. American Express Fin. Advisors, Inc.*, 464 F.3d 831, 837 (8th Cir. 2006) (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995)), *cert. denied*, 127 S. Ct. 2936 (2007); *see also Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084 (11th Cir. 1990) ("In the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination – the employing unity or work unit") (citation omitted). Relevant factors to consider include, among other things, whether the alleged discriminatory conduct or remarks were made by the actual decision maker or by a non-decision maker who influenced the decision, and "whether the statement itself is an exhibition of discriminatory animus or merely an opinion that such animus might exist." *Wittenburg*, 464 F.3d at 837 (quoting *Hutson*).

In this case, Mendelsohn sought to introduce the testimony of five former Sprint employees, all of who had been terminated as part of the company-wide RIF, as evidence that her selection for layoff was motivated by age. Specifically, each former employee would have testified that they, too, were the victims of unlawful age bias, albeit at the hands of different supervisors in different locations and at different times during the course of the RIF. Although none of the witnesses ever

worked with Mendelsohn in the Business Development Strategy Group (and thus were not subject to the same supervisory chain of command), she nevertheless believed their testimony would shed light on whether or not her supervisor, in rating her performance as deficient compared to others within the unit (which motivated the layoff decision) harbored a discriminatory age bias against her.

In *Earley v. Champion International Corp.*, the Eleventh Circuit considered an issue closely related to the one presented in this case regarding whether a district court properly excluded certain evidence in an age discrimination suit. 907 F.2d 1077 (11th Cir. 1990). There, the plaintiffs both were terminated as a result of the elimination of their positions due to a company-wide RIF. The ultimate decision as to which employees would be selected for layoff was made at the local level by each individual's supervisor. *Id.* at 1084. The plaintiffs were chosen, in part, based on their poor work performance. *Id.* at 1084 n.5.

They later sued, alleging age discrimination in violation of the ADEA. In support of their claims, the plaintiffs moved to compel nationwide discovery "about 'the identification of each person responsible for [Champion's] operation, the identification and function of each department, and the number and type of employees in each department and in the Company as a whole, by age for each year since January 1, 1980.'" *Id.* at 1084. The district court denied the motion to compel, and the Eleventh Circuit affirmed, concluding the evidence sought was not relevant to resolution of the plaintiffs' discrimination claims. It observed, "[a] vague possibility that loose and sweeping discovery might turn up something suggesting that the structuring of the RIF was discriminatorily motivated does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry." *Id.* at 1085 (citation omitted).

The same most certainly can be said of the "me, too" witness testimony Mendelsohn sought to introduce in this case. The proffered evidence could not provide any insight at all as to the manner in which Mendelsohn was treated or even whether her supervisors harbored any discriminatory animus, since none of the witnesses worked with her or in the same chain of supervision. Indeed, every one of the five witnesses would have testified only about alleged discriminatory statements or conduct of *other* Sprint employees, not those responsible for the decision to select Mendelsohn for layoff.

Furthermore, Mendelsohn long abandoned her pattern and practice claims, and chose to proceed only on an individual basis alleging intentional discrimination. As Judge Tymkovich correctly observed in his dissent:

> Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were the victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had company-wide discriminatory policies. Even taking as true Mendelsohn's assertion that these witnesses would provide credible evidence that managers other than [hers] were motivated by discriminatory animus, this does not in and of itself support the conclusion that [Mendelsohn's supervisor] was so motivated.

Pet. App. 20a-21a (footnote omitted). Because the "me, too" testimony Mendelsohn sought to introduce as proof of age bias against her was plainly irrelevant, it properly was excluded by the district court pursuant to Rule 401. And since the decision below creates a *per se* rule depriving district courts of the discretion to exclude irrelevant testimony offered by non-party witnesses regarding the alleged discriminatory misdeeds of individuals not even tangentially related to the challenged individual employment decision, it is erroneous and should be reversed by this Court.

II. A BLANKET RULE ALLOWING ANY AND ALL "ME, TOO" WITNESS TESTIMONY AS PROOF OF INTENTIONAL DISCRIMINATION AGAINST A SINGLE PLAINTIFF WILL UNDULY INTERFERE WITH EMPLOYERS' ABILITY TO DELEGATE DECISION MAKING AUTHORITY TO LOCAL MANAGERS

Many employers have decentralized management structures, in which local managers exercise some independent decision making authority. One of the inherent benefits of local decision making – carried out, of course, under an umbrella of corporate policies and guidelines – is that it leaves to the discretion of local supervisors matters that are likely to most affect their particular units or divisions. Those who are most knowledgeable about the day-to-day functions and needs of a department often are in the best position to make decisions that could immediately affect that department.[2]

Permitting evidence of other discrimination allegedly committed by distant supervisors not even remotely involved in the challenged employment decision could force employers to move from decentralized management structures to systems in which all decisions are implemented pursuant to a rigid, common system of administration. In an age of ever-increasing globalization and market demands, such a bureaucratic approach could place large companies in particular at a competitive disadvantage. Worse, since virtually every employment decision involves some exercise of subjectivity, treating subjective decision making as a common policy – as Mendelsohn sought to do in this case through "me, too" evidence – runs the risk of converting every combination of personnel decisions, no matter how separate and unlinked, into a possible class action. Under the sweeping, *per se*

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[2] It goes without saying that local decisions always should be made in accordance with corporate policies and procedures designed to ensure compliance with applicable laws and regulations.

evidentiary rule adopted by the court below, potential plaintiffs can string together unchallenged conjecture and common practices such as subjective decision making into nationwide classes of thousands or millions of employees.[3] Employers facing such claims may have little choice but to cut their losses through settlement, whether or not they have done anything wrong.

III. THE DECISION BELOW INEVITABLY WILL LEAD TO AN INCREASE IN COSTLY AND PROTRACTED EMPLOYMENT LITIGATION

A foreseeable consequence of the Tenth Circuit's ruling is that employment discrimination litigation will increase, particularly against large employers most vulnerable, simply by virtue of their size, to after-the-fact, "me, too" offers of evidence similar to the testimony Mendelsohn sought to introduce in this case. The decision below also is likely to encourage employees to file frivolous lawsuits, knowing they automatically will be permitted to introduce "me, too" testimony to bolster their own allegations of bias. This is particularly true in the context of reductions in force implemented by large employers, where often several hundred, if not thousand, employees may be affected. In addition, it puts employers in the untenable position of having to defend each case as if it were alleging a company-wide pattern and practice of discrimination, regardless of whether the actual plaintiff has made, or has laid a sufficient evidentiary foundation for, such a claim.

In other words, a plaintiff bringing a discrimination lawsuit against an employer, particularly a large employer, likely will have little difficulty finding at least a few other people who

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[3] This is not just a speculative argument. *See Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (certifying two million member class alleging sex discrimination based on "common practice" of subjective decision making).

are willing to testify, "Me too." The panel majority decision essentially holds that a trial court *must* allow these individuals to testify without any showing that they are "similarly situated" to the plaintiff, to wit, are in the same protected class, worked at some point for the same company, and lost their jobs under the same general circumstances. *See Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) ("This court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time . . . cannot be probative of whether age was a determinative factor in the plaintiff's discharge") (citations and footnote omitted). In a company with tens of thousands, perhaps hundreds of thousands of employees, the odds of some individuals meeting these vague criteria are very, very high.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions at some unknown point in the future. Permitting irrelevant "me, too" evidence of other discrimination effectively would *require* employers to reach back and defend actions and decisions taken months earlier, so as not to cause the fact finder, in the words of the Tenth Circuit, "to raise an eyebrow" to the true motives behind the employment action actually being litigated.[4] Indeed:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own

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[4] Improper admission of this type of evidence surely would interfere with an employer's substantive rights, as it likely would affect the outcome of the litigation. *See Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988) ("If one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected") (quoting *Jordan v. Medley*, 711 F.2d 211 (D.C. Cir. 1983)).

> layoff, each, in essence, would have presented a prima facie case of age discrimination. Defendants then would have been placed in the position of either presenting the justification for each witness's layoff, or of allowing the testimony to stand unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [the plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

Moorhouse v. Boeing Co., 501 F. Supp. 390, 393 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980); *see also Schrand*, 851 F.2d at 156 (The non-party testimony of other discrimination "embellished the circumstantial evidence directed to [whether the plaintiff was terminated due to age] by adding 'smoking gun' type evidence. It offered an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff's] favor").

Furthermore, federal public policy favors providing potential defendants to age discrimination claims with prompt notice of an alleged violation. The ADEA, for instance, requires plaintiffs, prior to filing suit in federal court, to file an administrative charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) within the applicable limitations period. 29 U.S.C. § 626(d). This statute of limitations serves the dual purpose of providing respondents with prompt notice of the claim and also giving the EEOC an opportunity to informally resolve the dispute through voluntary means. *Id.* As this Court recently observed in *Ledbetter v. Goodyear*, "[s]tatutes of limitations serve a policy of repose," which "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." 550 U.S. ___, 127 S. Ct. 2162,

2170 (2007) (quotations and citations omitted). They are "designed to assure fairness to defendants" and to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965).

Evidence pertaining to other, "me, too" allegations of discrimination likely will never have previously been brought to the defendant-employer's attention. Allowing its introduction will lead to longer, more costly trials, which is a result clearly at odds with the strong public policy favoring prompt notice and informal resolution of claims in lieu of protracted litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT COMPANY, PETITIONERS

v.

ELLEN MENDELSOHN, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF FOR EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address whether a district court must admit "me, too" evidence - testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

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INTEREST OF AMICUS CURIAE[1]

The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management organizations in the United States. It is comprised of nearly 4,000 companies of varying sizes in nearly every industry, employing in the aggregate approximately two million employees.

Because of its collective experience in employment relations matters, including its appearance as *amicus curiae* in dozens of cases in state and federal court, including many significant employment discrimination cases, the Employers Group is uniquely positioned to assess the impact and implications for employers of the legal issues presented in cases such as this one.

All of the Employers Group member organizations are subject to federal employment discrimination laws. All have policies and practices which prevent discrimination in their workplaces. In spite of this commitment to a discrimination-free employment, many of the Employers Group members have been victims of false claims of discrimination. Often these claims are based solely on employee conjecture and speculation. However, the defense of even the weakest of these claims has cost Employers Group members tens of thousands, and in some cases, millions of dollars. Employers Group members have a vital interest in both protecting their workforces from employment discrimination and in protecting themselves, their managers and their supervisors from claims of discrimination based upon spurious evidence.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of all *amicus curiae* Briefs. Their stipulations has been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, Amicus state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than Amicus, made a monetary contribution for the preparation and submission of this brief.

STATEMENT

Respondent, Ellen Mendelsohn, alleged that she had been unlawfully selected for layoff by her supervisor, Paul Reddick, because of her age. She offered the testimony of five ex-employees of the company. Each ex-employee was prepared to testify that in their own opinion they had been laid off because of their age. None of the five witnesses reported to Reddick or even worked in the same group. They each admitted that they did not know Reddick and had no information about Mendelsohn's layoff. Three of the employees, Hoopes, Wood, and Miller, were prepared to testify they had heard ageist remarks by other Sprint supervisors. JA 343a - 345a, Hoopes was prepared to testify that he had been replaced by a younger employee, and that his post-RIF job applications to Sprint had been rejected. JA 343a - 344a. Wood also was prepared to testify that she had seen another supervisor with a spreadsheet with ages listed on it. JA 344a - 345a; Borel was prepared to testify that he had been given a false evaluation by his supervisor, that he had been told by a manager that he had been banned from working at Sprint, and that he has seen another employee harassed because of her age. JA 346a - 347a.

Defendant objected to the evidence on the grounds that the testimony was unfairly prejudicial, confusing and a waste of time. The District Court permitted the testimony of any persons who were similarly situated in regard to their own layoff, but excluded the testimony of non-similarly situated "other employees ... from coming in and saying, I was RIF'd, it was because of my age." Pet. App 18a.. Because none of the five employees was supervised by Reddick or offered testimony about Reddick, they were not similarly situated and were not permitted to testify.

The Tenth Circuit held that it was an abuse of discretion for the district court to exclude the testimony of the five other employees because the testimony was evidence of a pattern and practice of age discrimination by the company. However, there is no legitimate pattern and practice

of age discrimination claim in this case. The only evidence of a pattern and practice claim, besides the testimony of the five witnesses, is that a few employees over 40 were laid off -- out of 15,000 who were subject to layoff -- and that layoff lists included protected information, including age.

SUMMARY OF ARGUMENT

Given the plaintiff's failure to assert a legitimate pattern and practice claim, the only purpose of "me too" evidence was to show the character of the corporate defendant. Yet FRE 404 (b) prevents the use of "crimes, wrongs and acts" committed by other persons to show the character of the defendant. Evidence that other supervisors may have discriminated against other employees based on age, even if true, does not make it more or less likely that Reddick discriminated against Mendelsohn. The only effect of such evidence would be to besmirch the character of the corporate defendant, create jury sympathy, and inflame the jury to punish the corporation.

Moreover, even assuming that Plaintiff had a legitimate pattern and practice claim, it was within the wide discretion of the district court to determine whether or not "me too" evidence should be admitted. The Tenth Circuit decision creates a *per se* rule that "me too" evidence must be admitted in employment discrimination cases unless the district court finds that the evidence is "cumulative" or "marginally relevant." In the Tenth Circuit, a district court must admit "me too" evidence even if the court finds the evidence unfairly prejudicial, confusing or a waste of time. The Tenth Circuit "me too" rule thus conflicts directly with FRE 403, which gives discretion to the district court to exclude evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

ARGUMENT

I. GIVEN THE ABSENCE OF A VALID PATTERN AND PRACTICE CLAIM, THE DECISION BELOW STRAYS FROM THIS COURT'S TEACHINGS THAT IN EMPLOYMENT DISCRIMINATION CASES THE FOCUS IS ON THE MOTIVE OF THE ALLEGED DISCRIMINATOR, NOT ON EMPLOYEE CONJECTURE ABOUT DISCRIMINATION BY OTHER SUPERVISORS

For at least the last 30 years, this Court has held that the focus in discrimination cases is on the motive of the alleged discriminator. In both Title VII cases and in Age Discrimination in Employment Act ("ADEA") cases, the Court has held that "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper* v. *Biggins*, 507 U.S. 604, 610 (1993); *Reeves* v. *Sanderson Plumbing Product, Inc.*, 530 U.S, 133, 141 (2000); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) ("[T]he plaintiff is required to prove that the defendant had a discriminatory intent or motive"). Consistent with this teaching, the Court has also established an evidentiary scheme, the end result of which is the determination by the trier of fact of the alleged discriminator's true motive. *McDonald Douglas* v. *Green*, 411 U.S. 792 (1973). Unfortunately, by requiring the admission of "me too" evidence absent a valid pattern and practice claim, the Tenth Circuit failed to follow this substantial body of law, including the Court's teaching that the critical factor in employment discrimination cases is to determine the intent of the alleged discriminator, not the opinions of non-similarly situated employees that their supervisors discriminated against them.

The decision also conflicts with FRE 404(b) by permitting the use of "acts, wrongs and crimes" committed by someone other than the defendant or the alleged discriminator to besmirch character.

A. In The Absence Of A Valid Pattern And Practice Claim, "Me Too" Evidence From Other Employees About Discrimination By Unrelated Supervisors Is Not Relevant Evidence In Determining The Motive Of The Alleged Perpetrator

1. Federal Rule of Evidence §401 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. There is nothing about the testimony of the "me too" witnesses that makes it more or less probable that Reddick's layoff decision was motivated by Mendelsohn's age. Testimony about employee's personal beliefs that that they were the victims of discrimination, ageist comments by other supervisors, another supervisor's layoff list, and an employee's belief that another supervisor harassed an unrelated employee provides no insight into Reddick's state of mind when he selected Mendelsohn for layoff.

In short, in the absence of a pattern and practice claim, "me too" evidence, even if accurate, has no probative value. Whether an individual supervisor engaged in discrimination is not affected by whether or not *other* supervisors violated the law. In the individual supervisor discrimination case, "me too" evidence is nothing more than slander by association: If other supervisors did it, then you must have done it too.

2. For similar reasons, admission of such evidence violates Federal Rule of Evidence §404(b), which provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This Court has discussed this Rule in terms of an individual's other acts and held that the previous wrongs of one actor may be admissible to show that person's intent. *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988). However, the Court has taught that testimony about a third party's "crimes, wrongs and

acts" is not relevant regarding the intent of an unrelated defendant. "[T]he [plaintiff] may [not] parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. . . . In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* 689 (emphasis added).

Here, the finder of fact obviously could not conclude that Reddick, "was the actor" with respect to the incidents described in the "me too" evidence. Accordingly, the district court was correct in excluding such testimony from non-similarly situated witnesses, and the Tenth Circuit was wrong to require its admission.

II. "ME TOO" TESTIMONY IS UNFAIRLY PREJUDICAL, CONFUSES THE ISSUES, MISLEADS THE JURY AND FORCES THE DEFENDANT TO PROVE THAT IT DID NOT DISCRIMINATE AGAINST NON-SIMILARLY SITUATED EMPLOYEES WITH UNRELATED CLAIMS.

A defendant faced with "me too" testimony is compelled to counter each "me too" claim. Failure to provide compelling evidence that it did not discriminate in regard to any one of the "me too" claims leaves the defendant vulnerable to a trier of fact concluding that, "if they did it once they probably did it again."

In this case, if the "me too" evidence had been admitted, Sprint would have had to refute the testimony of Hoopes, Wood, and Miller that they had heard ageist remarks by other Sprint supervisors JA 343a - 345a, the testimony of Wood that another supervisor had a spreadsheet showing ages which the supervisor may have considered in making his layoff decisions, JA 344a - 345a, the testimony of Borel, that he had been given a false evaluation, another manager had informed him that he had been banned from working at Sprint and that he had witnessed another employee being harassed because of her age. JA 346a - 347a

and the testimony of Hoopes that he had been replaced by a younger employee, and that his post-RIF job applications to Sprint had been rejected. *Id.* JA 343a - 344a. None of that testimony would have provided any probative evidence regarding Reddick's motives in laying off Mendelsohn. However, Sprint would have had to rebut the testimony of each of those witnesses or face the argument that if they did it to them they must have done it to Mendelsohn too.

In addition, even if the defendant rebuts each "me too" witness, such testimony still leaves with the trier of fact a suspicion that "if there is smoke, there must be fire." Here, by parading a number of other unhappy witnesses before the jury, the Plaintiff would effectively deliver the message that Sprint is a bad company with unhappy employees. In fact, the sole purpose of the "me too" evidence is to besmirch the character of the corporation, create jury sympathy and encourage the jury to punish the corporate defendant.

Any corporate defendant faced with "me too" evidence in these circumstances has a Morton's fork dilemma of either spending hundreds of thousands of dollars in trial costs attempting to convince the jury that it's supervisors and managers are committed to a discrimination-free workplace or agreeing to an extortionate cost of defense settlement. The District Court was correct in excluding the testimony.

III. THE TENTH CIRCUIT DECISION IMPROPERLY TAKES AWAY THE DISCRETION OF THE TRIAL JUDGE TO DETERMINE IN PATTERN AND PRACTICE CASES WHETHER "ME TOO" EVIDENCE IS UNFAIRLY PREJUDICIAL, OR CONFUSING, OR MISLEADING OR AN UNDUE WASTE OF TIME

Even if there were a legitimate pattern and practice claim in this case, the Tenth Circuit's decision improperly intrudes into a district judge's prerogative to exclude oth-

erwise admissible evidence under Rule 403. This Court has taught that in pattern and practice discrimination cases "me too" evidence *may* be relevant. *Teamsters* v. *United States*, 431 U.S. 324 339 (1977). As the Court put it, "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." *Id.* However, even assuming that this is a pattern and practice discrimination case, it is within the discretion of the trial judge to determine whether the evidence is unfairly prejudicial, confusing, misleading or an undue waste of time.

Federal Rule of Evidence 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Tenth Circuit impermissibly limited this broad authority. It rejected Sprint's argument that "allowing the evidence would prejudice Sprint because it would result in Sprint having to defend multiple claims of discrimination." It held that, "to be sure, *the district court retains its power to limit cumulative and marginally relevant testimony.* But otherwise we disagree." Pet. App 15a (emphasis added)

In sum, the majority opinion goes too far by taking away the discretion of the trial court to exclude "me too" evidence that is unfairly prejudicial, confusing or a waste of time. As the dissent points out, the majority opinion appears to create a *per se* rule that all "me too" evidence must be admitted in an employment discrimination case. Pet. App 20a, 23a. Yet Rule 403 grants the trial judge the discretion to admit or not admit relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence."

As this Court stated in *United States* v. *Abel*, 469 U.S. 45, 54 (U.S. 1984), "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." However, after the Circuit Court decision in this case, a district court in the Tenth Circuit can refuse to admit "me too" evidence only if the court finds the evidence "cumulative" or "marginally relevant." The Tenth Circuit has taken away the district court's "wide discretion" and requires the trial judge to admit "me too" evidence even if she believes it is unfairly prejudicial, or confusing or a waste of time. The district court's order was within the discretion granted the court by FRE 403 and should not have been overturned.

CONCLUSION

For the reasons stated, this Court should reverse the ruling below.

Respectfully submitted,

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August 2007

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No. 06-1221

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN JUSTICE CENTER, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, PEOPLE FOR THE AMERICAN WAY FOUNDATION, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN EMPLOYED IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Mexican American Legal Defense and Educational Fund, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, Inc., National Association of Social Workers, National Employment Lawyers Association, National Partnership for Women & Families, National Women's Law Center, People for the American Way Foundation, Puerto Rican Legal Defense and Education Fund, and Women Employed submit this Brief as *amici curiae* with the consent of the parties,[1] in support of Respondents' argument that "other supervisor" evidence should not be *per se* inadmissible under the Federal Rules of Evidence.

Amici represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. *Amici* submit this brief because of the direct impact this ruling will have on victims of unlawful discrimination. If the victim's evidence is limited by a *per se* rule of exclusion, then unlawful discrimination may go without remedy. The interests of the employees served by *amici* will be directly affected by this Court's ruling in this matter.

Summary descriptions of each of the *amici* are included in the appendix to this brief.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Circumstantial evidence, such as "other supervisor" evidence, that an employer either tolerates or encourages unlawful discrimination may be a key component of a victim's proof of intentional discrimination. The issue presented in this case is as important as it is simple—whether this Court should decline Petitioner Sprint/United Management Company's ("Sprint") suggestion of a rigid *per se* rule excluding *all* "other supervisor" evidence in *all* employment discrimination cases. The *per se* rule of exclusion urged by Sprint would replace the commonly understood and universally followed analysis for determining admissibility under the Federal Rules of Evidence, which gives trial courts the flexibility to control the presentation of evidence based on the specific facts at issue in each of the individual cases before them.

Because Respondent and the Solicitor General provide a detailed analysis of why "other supervisor" evidence may be both relevant and not unduly prejudicial, this brief will focus instead on the devastating effect that the *per se* exclusion of such evidence would have on employees' ability to prove individual claims of discrimination. This brief will also refute several misconceptions presented by Sprint and its business *amici* regarding the effect of admitting "other supervisor" evidence.

As discriminatory employment practices become less overt, and thus increasingly difficult to prove, plaintiffs who bring discrimination actions must rely more and more on circumstantial evidence to establish that they have been discriminated against. Endorsing the *per se* rule requested by Sprint, which

would exclude *all* "other supervisor" evidence, would further reduce these plaintiffs' already limited store of available evidence to prove and combat illegal discrimination. In so doing, it would undermine our nation's express commitment to eradicating discrimination.

Sprint's and its *amici*'s professed mistrust of juries is no basis for excluding *all* "other supervisor" evidence. The Court and recent scientific scholarship have recognized that juries can and do function as fair and unbiased arbiters of the evidence presented to them, and that individual jurors can and should be trusted to make sound decisions free from emotional or personal bias. Juries are routinely asked to parse through even the most complex and difficult facts, and to decide emotionally charged matters including, literally, matters of life and death. There is simply no justification for treating juries differently in cases involving employment discrimination.

Rejecting Sprint's proposed *per se* rule of exclusion will not create a significant burden on courts or defendants. The Federal Rules of Evidence already provide sufficient safeguards against the admission of irrelevant, unduly prejudicial, or cumulative evidence; pursuant to the rules, trial courts routinely decide questions of admissibility that are no more or less complicated than the question of whether "other supervisor" evidence should be admissible in certain employment discrimination cases. Moreover, admitting "other supervisor" evidence does not change the legal standard for determining liability in discrimination cases. Rejection of Sprint's proposed *per se* rule of exclusion will not encourage plaintiffs to pursue frivolous lawsuits, despite Sprint's and its

amici's unsubstantiated arguments to the contrary. A rule that permits the admission of "other supervisor" evidence in appropriate cases will actually encourage compliance with anti-discrimination laws, thus reducing discrimination claims.

ARGUMENT

The Federal Rules of Evidence provide an appropriate vehicle for analysis of the admissibility of "other supervisor" evidence.[2] As recognized by the Solicitor General, this evidence is both relevant and not unduly prejudicial in many circumstances. (Solicitor General's Br. at 16, 23-24.)[3]

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[2] Sprint and its *amici* argue that in order to lay a proper foundation for "other supervisor" evidence, the plaintiff must present independent evidence demonstrating that Sprint has company-wide discriminatory practices. (Chamber of Commerce's Br. at 7; Pet's Br. at 31-32.) As the Solicitor General correctly points out (Solicitor General's Br. at 21), this argument is not supported by the Federal Rules of Evidence, which indicate that a foundation is laid when the evidence as a whole could lead a reasonable fact-finder to conclude that the employer has a policy of discrimination. *See* Fed. R. Evid. 104(b); *cf. Huddleston v. United States*, 485 U.S. 681, 689-90 (allowing evidence of "other wrongs" if a jury could conclude by a preponderance of the evidence as a whole that the "other wrongs" occurred). This burden can be, and often is, met with circumstantial evidence. *See, e.g., United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997).

[3] Despite its characterization of "other supervisor" evidence as "sometimes" admissible, the Solicitor General's brief demonstrates that this type of evidence is often relevant, rarely unduly prejudicial, and admissible in most circumstances. (*See* Solicitor General's Br. at 14 (recognizing that "Rule 401 sets a purposely low gateway threshold for the introduction of evidence," which "may be satisfied even if the evidence 'only slightly affects the trier's assessment of the probability of the matter to be proved'") (internal citations omitted); *id.* at 23 (acknowledging that "when other-supervisor evidence has substantial probative force,

Rule 401 of the Federal Rules of Evidence states that evidence is relevant if it has "any tendency" to make a party's claim more probable. In many circumstances, "other supervisor" evidence will make it more probable that the employer has a company-wide practice of discrimination. It may help to prove an employer's motive and intent to discriminate,[4] and may be especially germane to proving that an employer's actions are a pretext for discrimination. Indeed, the Court held that "evidence that may be relevant to any showing of pretext includes facts as to . . . *[an employer]'s general policy and practice with respect to minority employment.*" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (emphasis added).[5]

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generalized concerns of jury confusion and unfair prejudice ordinarily do not outweigh, much less *substantially* outweigh, the probative value of the other-supervisor evidence and therefore do not justify the exclusion of the evidence under Rule 403") (emphasis in original).)

[4] *See* Fed. R. Evid. 404(b); *see also Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (stating that "other supervisor" evidence of a discriminatory atmosphere may be relevant to showing "the corporate state-of-mind" at the time of the plaintiff's termination); *Philip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (concluding that evidence of discrimination claims by other employees "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive"); *Morris v. WMATA*, 702 F.2d 1037, 1046 (D.C. Cir. 1983) (finding that testimony from other employees showing a broad practice of retaliation "has some probative value on the issue of the employer's likely motivation here").

[5] Contrary to the Chamber of Commerce's assertion that *McDonnell Douglass* held that a plaintiff is limited to using statistics to prove an employer's general policy of discrimination (Chamber of Commerce's Br. at 8), there is nothing in that opinion or other opinions that indicate the Court meant to restrict plaintiffs from also using other forms of evidence. *See McDonnell Douglas*, 411 U.S. at 805. Indeed the opposite is true; as discussed

Thus, when determining whether to permit such evidence at trial, the trial court should - and must - determine whether, based on the facts of that individual case, the proposed "other supervisor" evidence has "any tendency" to demonstrate the employer's general policies and practices with regard to protected employees.

Relevant evidence may, of course, be excluded if its probative value is *substantially* outweighed by its prejudicial effect. Fed. R. Evid. 403. This, too, involves a fact-intensive inquiry that would be subverted by a *per se* rule excluding all "other supervisor" evidence.

I. THE ABILITY TO INTRODUCE "OTHER SUPERVISOR" EVIDENCE IS VITAL TO EFFECTIVE ENFORCEMENT OF OUR NATION'S ANTI-DISCRIMINATION LAWS.

A. Eliminating Discrimination is a Nationally Recognized Priority That is Furthered by the Admission of "Other Supervisor" Evidence.

Our employment laws reflect our national commitment to eliminating discrimination in the workplace. The Civil Rights Act of 1964 affirmed our nation's commitment to eradicate discrimination in the United States. In signing the bill, President Lyndon B. Johnson stated that "[the denial of equal rights] cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of freedom forbid it. Morality forbids it. And the [Civil Rights Act]

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infra, the Court has recognized the need to protect the ability to introduce all relevant evidence.

forbids it."[6] More than 25 years later, President George H. W. Bush reiterated the country's continued commitment to equality when he signed the Americans with Disabilities Act to "remove the physical barriers we have created and the social barriers we have accepted. For ours will never be a truly prosperous nation until all within it prosper."[7] In keeping with these fundamental principles, the Supreme Court has time and again recognized that anti-discrimination laws reflect an "important national policy." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).[8]

The Court's ruling in this case will have broad implications for the realization of the national goal of eliminating discrimination in the workplace. First, although Respondent's claim is limited to age discrimination, a *per se* rule excluding *all* "other supervisor" evidence would severely hamper future plaintiffs' ability to prove all types of employment

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[6] Lyndon B. Johnson, President of the U.S., Remarks Upon Signing the Civil Rights Bill (July 2, 1964).

[7] George H. W. Bush, President of the U.S., Remarks on the Signing of the Americans with Disabilities Act (July 26, 1990).

[8] *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) (stating that "ameliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority'"); *Johnson v. California*, 545 U.S. 162, 172 (2005) (recognizing "the overriding interest in eradicating discrimination from our civic institutions"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (pointing out "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin"); *Rose v. Mitchell*, 443 U.S. 545, 578 (1979) (noting the "compelling constitutional interest of our nation in eliminating all forms of racial discrimination"); *NAACP v. FPC*, 425 U.S. 662, 665 (1976) (concluding, "the elimination of discrimination from our society is an important national goal").

discrimination.[9] Second, if this Court were to adopt the *per se* rule of exclusion urged by Sprint and its business *amici*, then individual victims alleging discriminatory employment policies would be forced to choose between two alternatives: either rely on statistics alone or plead and present evidence of a pattern and practice of discrimination in every case. Being forced to depend on statistics alone would severely inhibit the plaintiff's ability to make his or her case because, as the Court has recognized, testimony regarding "personal experiences with the company [brings] the cold numbers to life." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).[10] Furthermore, given the significant expense of procuring expert testimony, it is often not feasible for individual plaintiffs to obtain the refined statistics necessary to prove a pattern and practice of discrimination.

This Court should not compel plaintiffs to bring a pattern and practice claim simply so they will be allowed to introduce "other supervisor" evidence. Sprint's proposal of a *per se* exclusion would have the perverse effect of actually encouraging broader claims by plaintiffs.

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[9] *See, e.g., LaClair v. City of St. Paul*, 187 F.3d 824 (8th Cir. 1999) (analyzing the admissibility of "other supervisor" evidence in a retaliation claim); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596-597 (1st Cir. 1987) (upholding the admission of "other supervisor" evidence in a gender discrimination case); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986), *abrogated on other grounds by Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (admitting "other supervisor" evidence in a race discrimination claim).

[10] Ironically, employers have previously urged the Court to rely *not* on statistics, but rather on anecdotal evidence. *See, e.g., Int'l Bhd. of Teamsters*, 431 U.S. at 339-43.

Given the vital interests at stake, the Court should not prevent plaintiffs from presenting *all* evidence that is relevant and not unduly prejudicial or burdensome. A *per se* exclusion of all "other supervisor" evidence would unfairly impede the ability of plaintiffs to prove all future claims of discrimination.

B. Because Direct Evidence of Discrimination is Rarely Available, Circumstantial Evidence, Including "Other Supervisor" Evidence, May Be Critical to Proving Employment Discrimination.

The Court has repeatedly observed that direct, "smoking gun" evidence of discrimination can be very difficult to uncover. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").[11] Similarly, every Court of Appeals has recognized the "elusive" nature of direct proof of discrimination and plaintiffs' subsequent need, in many cases, to rely on

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[11] *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.") (internal quotations omitted); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (recognizing that "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors"); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

circumstantial evidence.[12] Indeed, the Court "has often acknowledged the utility of circumstantial evidence in

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[12] *See also Jordan v. City of Cleveland*, 464 F.3d 584, 596 (6th Cir. 2006) ("Proof of discriminatory animus presents 'an elusive factual question' that is often difficult to determine by way of direct proof."); *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1100 (9th Cir. 2005) ("Employment discrimination cases inevitably present difficult problems of proof, precisely because we cannot peer into the minds of decisionmakers to determine their true motivations."); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) ("A 'smoking-gun' case in the discrimination arena is rare."); *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605, 612 (7th Cir. 2001) (acknowledging that "employers usually are 'careful not to offer smoking gun remarks indicating intentional discrimination'") (internal citations omitted); *Crawford v. Formosa Plastics Corp., Louisiana*, 234 F.3d 899, 902 (5th Cir. 2000) ("We have often recognized the difficulty of proving discrimination by direct evidence."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999) (recognizing that "'smoking gun' evidence is rarely found in today's sophisticated employment world") (internal citations omitted); *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999) ("The Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 685 (10th Cir. 1998) (noting that "direct evidence is rarely available in a discrimination case and circumstantial evidence is sufficient"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1537 (11th Cir. 1997) ("Frequently, acts of discrimination may be hidden or subtle; an employer who intentionally discriminates is unlikely to leave a written record of his illegal motive, and may not tell anyone about it"); *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) ("An employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent."); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) ("The *McDonnell Douglas* scheme is a recognition that direct proof of unlawful discrimination is often difficult to obtain."); *Cuddy v. Carmen*, 694 F.2d 853, 860 (D.C. Cir. 1982) ("Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decision makers, and therefore they

discrimination cases," and that such evidence is no less compelling, persuasive, or valuable than more direct methods of proof. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (acknowledging that "juries are routinely instructed that 'the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence'") (citations omitted).

The need to rely on circumstantial evidence often makes it very difficult for plaintiffs to prevail in employment discrimination cases, even under *existing* evidentiary standards.[13] A *per se* rule excluding all "other supervisor" evidence, regardless of circumstances, would further constrain victims of discrimination and render it even more difficult to hold employers responsible for discriminatory conduct. As the Eighth Circuit explained, "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of his own motives." *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097,

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usually can gather only circumstantial evidence of discriminatory motives.").

[13] Employment discrimination plaintiffs fare worse at the trial court level than plaintiffs in nearly all other classes of cases. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. of Empirical Legal Studies 429, 444, 452 (2004). Should an employment discrimination plaintiff actually prevail at trial, they face reversal in nearly 42 percent of cases appealed by defendants. *See id.* at 449-451; *see also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. Ill. L. Rev. 947, 957-58 (2002). By contrast, when a plaintiff appeals a judgment for an employer, the judgment is reversed less than 8 percent of the time. *See* Clermont & Schwab, at 442, 452.

1103 (8th Cir. 1988). Without effective means of proving employment discrimination, existing anti-discrimination statutes would essentially become broken promises of equality. Laws would remain on the books, but due to court-imposed evidentiary constraints could practically be rendered meaningless.

As discriminatory employment practices become less overt, the evidentiary problems for employees adversely affected by discrimination have become more pronounced. Racial epithets and blatantly discriminatory policies and personnel decisions have largely been replaced by subtle comments, seemingly neutral policies that are unfairly applied, and private personnel discussions held behind closed doors. *See, e.g., Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) ("Discrimination continues to pollute the social and economic mainstream of American life, and it is often simply masked in more subtle forms . . . [W]hile discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind.").

Given the evidentiary problems posed by clandestine discrimination, circumstantial evidence, such as "other supervisor" testimony, is essential to the continued efficacy of our anti-discrimination laws. Creating an additional and arbitrary rule categorically excluding specific forms of circumstantial evidence in employment discrimination cases would be contrary to the Federal Rules of Evidence and would do great damage to our anti-discrimination laws.[14]

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[14] This Court pointed out in *Desert Palace* that circumstantial evidence is sufficient to support a criminal conviction, even though guilt must be proved beyond a reasonable doubt. *See* 539 U.S. at 100. It stands to reason, therefore, in a civil context where

Excluding "other supervisor" evidence in all discrimination cases would not only contradict the Court's endorsement of the use of circumstantial evidence in appropriate circumstances, but would also ignore the realities of contemporary discrimination. It is precisely because the forms of discrimination have changed over time that broad evidentiary exclusions, such as those advanced by Sprint and its *amici*, are inappropriate. *See Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987). The burdens already placed on plaintiffs in discrimination cases have prompted an appropriate "judicial inhospitability to blanket evidentiary exclusions in discrimination cases." *Quinn v. Consol. Freightways Corp. of Del.*, 283 F.3d 572, 578 (3d Cir. 2002).

If our anti-discrimination laws are to have any sustained force, and if our nation's stated commitment to eradicating discrimination is to have continued meaning, this Court should not abandon the Federal Rules of Evidence and establish a *per se* rule excluding all "other supervisor" evidence no matter what the circumstances of each individual case. The decision whether to admit such evidence should be left to the sound discretion of the trial court.

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liability is established by a preponderance of the evidence, that the Federal Rules of Evidence also afford sufficient safeguards for the admission of circumstantial evidence in discrimination cases, namely "other supervisor" evidence.

II. JURIES CAN ANALYZE "OTHER SUPERVISOR" EVIDENCE PROPERLY AND WITHOUT UNDUE PREJUDICE TO THE EMPLOYER

Sprint and its *amici* claim, without support, that even the strongest jury instruction could not protect against the potential for undue prejudice caused by "other supervisor" testimony, and thus juries will cavalierly impose liability if they find that the defendant discriminated against any single witness. (Pet. Br. at 44; Chamber of Commerce's Br. at 9-10.) In so doing, Sprint and its *amici* assert that juries simply cannot be trusted—a view that has been widely discredited as both elitist and scientifically unsound. There is no justification for allowing Sprint's and its *amici*'s claimed fears, however unfounded they may be, to prevent victims of discrimination from holding employers responsible. *See Riordan*, 831 F.2d at 698 ("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.").

A. Juries Have Long Been Trusted to Evaluate Evidence and to Make Unbiased Decisions in Even the Most Emotionally Charged Cases.

Our legal system has consistently operated under the assumption that juries not only can but *should*, and in many cases *must*, be trusted. In the seminal ruling of *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968), for example, the Court affirmed our centuries-old tradition of entrusting juries with the power to decide the weightiest of issues, explaining:

> We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings . . . [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them.

Justice Scalia, writing for the majority in *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), counseled that the right to a jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, a jury trial is meant to ensure their control in the judiciary." As Justice Scalia emphasized, the importance of the jury has been recognized since the time of the Founding Fathers.[15]

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[15] John Adams wrote in 1771 that "'[T]he common people, should have as complete a control . . . in every judgment of a court of judicature' as in the legislature." *Blakely*, 542 U.S. at 296, 306. Thomas Jefferson, writing in 1789, similarly declared, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." *Id.* (internal citations omitted).

In espousing its flawed position, Sprint seeks to undermine the very nature and unique power of the American judicial system. Sprint would have this Court exclude *all* "other supervisor" evidence in employment discrimination cases based on the unsupported—and insupportable—assertion that juries are fickle and untrustworthy entities that would "inevitabl[y]" be swayed by "personable, sympathetic and attractive persons." (Pet. Br. at 44.) To the contrary, the likelihood that juries will be unduly swayed by sympathy or emotion as a result of "other supervisor" evidence pales in comparison to the highly charged matters, such as those involving life and death,[16] that courts routinely ask juries to adjudicate. Juries, far from being erratic and naïve, "take seriously their duties as officers of the law." Paul D. Carrington, *The Civil Jury and American Democracy*, 13 Duke J. Comp. & Int'l L. 79, 88.

B. Juries are Fully Capable of Properly Evaluating "Other Supervisor" Evidence in Cases Alleging Discrimination.

Ignoring our centuries-old trust in juries of our most complex disputes of all shapes and sizes,[17] Sprint

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[16] *See, e.g., Durr v. Mitchell*, 487 F.3d 423, 447 (6th Cir. 2007) (upholding jury's imposition of the death penalty); *Coleman v. Giles*, 140 Fed. Appx. 895, 900 (11th Cir. 2005) (upholding jury verdict in rape case); *United States v. De La Rosa*, 911 F.2d 985, 992 (5th Cir. 1990) (upholding jury verdict in kidnapping case).

[17] *See* U.S. Const. art. III § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury"); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"); U.S. Const. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved").

argues that juries should not be trusted when it comes to analyzing "other supervisor" evidence. Sprint asserts that, "in any RIF axiomatically there will be personable, sympathetic and attractive persons," that "[j]uror sympathy to these individuals is inevitable," and that therefore this Court should not trust juries to make rational decisions in such cases. (Pet. Br. at 44.) Sprint's argument, in this regard, is fundamentally flawed.

Much of the most recent and authoritative scholarship on the value of the jury system reinforces the most basic tenet of our system of justice: in almost all cases, juries can be counted on to make the most difficult of decisions fairly. Researchers have found that judges and juries reach the same conclusion in most cases and, where they disagree, judges and juries are evenly split on which party should win.[18] Indeed, in a classic study comparing the decision-making of judges and juries, the evidence indicated that there was "no relationship between the complexity of a case and the differences in their decisions."[19]

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[18] *See* Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcome of Complex Cases?* 29 Am. J. Trial Advoc. 19, 24 (2005) ("[A] team of prominent legal and social science researchers, led by Harry Kalven and Hans Zeisel, compared the decisions of trial judges and juries in 3576 criminal and civil trials and found that trial judges and juries made identical decisions in the same case seventy-eight percent of the time . . . [The study] further determined that, in the remaining twenty-two percent of cases, judges and juries were about evenly split on which party should win . . . More recently, in a study of the effects of jury trial innovations on jury decision-making, researchers found similar agreement between the decisions of trial judges and juries. Their findings were consistent with those of the prior Kalven and Zeisel study.").

[19] *Id.*

The scholarship highlights that the complexity of an issue does not affect the rationality of a jury's decision. Indeed, studies indicate that, although "there is neither objective nor scientific proof that trial judges are generally more capable than juries in comprehending complicated subject matter," both "research and anecdotal evidence indicate that trial judges are usually no more capable than lay jurors in comprehending and interpreting complicated subject matter or in determining the reliability and value of . . . testimony." *Id.* at 23-24. Further, the relevant evidence points to a finding that juries are likely better at combing through difficult evidence and concepts than trial judges.[20]

Jurors are routinely called on to parse through difficult evidence and to understand complex and frustrating concepts. *See, e.g., Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) ("There is simply no reason to believe that judges are any more qualified than juries to resolve the complex technical issues often present in patent cases."). There is no reason to assume, as Sprint contends, that juries are incapable of such analysis in cases involving the comparatively simple issue of whether a plaintiff was treated unfairly for discriminatory reasons.

Understanding the distinction between "same supervisor" evidence and "other supervisor" evidence is far from the most challenging intellectual feat juries are expected to perform. Unless this Court is willing to erode the axiom that jurors are capable of fulfilling their fundamental duties—a decision that would have

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[20] *See* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark For Judging?*, 32 Fla. St. U. L. Rev. 469, 509 (2005).

significant consequences in all areas of the law—it is untenable to suggest that trial judges and juries should be prohibited from engaging in this simple task.

C. The Trial Court's Limiting Instructions Can Assist a Jury to Determine the Weight to be Afforded to "Other Supervisor" Evidence.

Juries are often asked to digest evidence and arguments presented by both parties in the context of the judge's limiting instructions. There is no basis to assume—as Sprint apparently does (Pet. Br. at 43-44)—that juries are incapable of performing that function in a case involving "other supervisor" evidence, and so will unthinkingly accept a plaintiff's evidence over that offered by the defendant. Sprint argues that allowing "other supervisor" evidence will create "an intolerably high risk of jury confusion." (Pet. Br. at 42.) Yet it is a fundamental tenet of our system of justice that juries are able to comprehend and follow a judge's limiting instructions.

The Court has repeatedly held that, when a trial judge gives a jury limiting instructions, those instructions can be assumed to have been followed. In *Michelson v. United States*, 335 U.S. 469, 484-485 (1948), the Court explained:

> [L]imiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects; for example, instructions that admissions of a co-defendant are to be limited to the question of his guilt and are not to be

considered as evidence against other defendants.[21]

Sprint's contention that juries cannot be trusted to act in conformity with a trial court's instructions shows an extreme and unjustified lack of faith in juries contrary to the unwavering commitment to the jury system expressed by the Founding Fathers and the members of the Court.

Although Sprint argues that juries are easily swayed, and will automatically accept a plaintiff's evidence with little or no critical analysis, both the Court and recent scholarship on the matter have confirmed that juries can be trusted to digest even the most difficult evidence rationally and logically.[22]

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[21] The Court has rejected the argument that jurors will assign guilt to all co-defendants if they believe that at least one defendant is guilty, instead holding that a district court's instruction that each defendant is entitled to separate consideration is sufficient to cure any possible prejudice. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993). The same principle applies here; the Court should reject Sprint's *amici*'s argument that allowing "other supervisor" evidence will invite juries to find liability if it finds that any one of the witnesses suffered unlawful discrimination, regardless of whether Mendelsohn proves *her* claim. (Chamber of Commerce's Br. at 14.) As in *Zafiro*, evidence should not be taken away from the jury where a proper limiting instruction will adequately serve to eliminate any possible prejudice.

[22] A recent study indicates that trial judges have consistently given "their civil juries high marks for their process of decision making." Paula L. Hannaford, B. Michael Dann, & G. Thomas Munsterman, *How Judges View Civil Juries*, 48 DePaul L. Rev. 247, 249-250. Indeed, "over 98% of state and federal judges believe that jurors usually make a serious effort to apply the law as they are instructed . . . Seventy-nine percent of the survey respondents rejected the suggestion that bias in favor of a party was the reason for judge-jury disagreement and 92% rejected jury miscomprehension as the reason for the disagreement." *Id.*

"Most commentators conclude that a carefully selected jury given accurate instructions and presented with coherent evidence will be superior to a judge because of jurors' collective comprehension and independent, earnest approach to the proceedings." Lisa Kern Griffin, *'The Image We See Is Our Own': Defending the Jury's Territory at the Heart of the Democratic Process* 75 Neb. L. Rev. 332, 365-66 (1996).

III. ADMITTING RELEVANT "OTHER SUPERVISOR" EVIDENCE WILL NOT UNNECESSARILY BURDEN COURTS OR DEFENDANTS

A. The Federal Rules of Evidence Provide Judges with Safeguards to Protect Against Uninformative or Duplicative Evidence.

Sprint and its *amici* argue that, without a *per se* exclusion of "other supervisor" evidence, courts and defendants will be overcome by excessive testimony about discrimination suffered by non-party witnesses at the hands of non-party supervisors. (Pet. Br. at 40; EEAC *et al.'s* Br. at 12-13.) But there is no reason to believe that trial courts are not fully capable of managing their trials and the evidence admitted therein. As with nearly all evidentiary issues, trial courts must be permitted to consider evidentiary questions on a case-by-case basis and should be afforded broad discretion to preclude the introduction of evidence that is duplicative or that does not have sufficient probative value.

The Rules already provide that only relevant "other supervisor" evidence may be admitted at trial. *See* Fed. R. Evid. 401. Sprint's claimed fear that evidence that is too far removed in time or circumstance will be admitted ignores the vital role

that the trial judge plays in managing a trial and making evidentiary determinations. Where evidence demonstrating the bias or discriminatory acts of other supervisors is too remote to warrant its admission, the trial court has the discretion to exclude it. *See, e.g., Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (recognizing that "other supervisor" evidence can be too attenuated and that testimony to this effect should be let in sparingly). In other cases, circumstantial evidence of discrimination by other supervisors will not only be relevant, but also crucial to the plaintiff's claim. *See, e.g., Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128 (3d Cir. 1997) (upholding the admissibility of comments made by individuals that were not involved in the decision to terminate the plaintiff). Indeed, in this case, the Tenth Circuit performed this analysis and found that the "other supervisor" evidence in question was not too removed by either time or circumstance because the other employees were terminated within a year of Mendelsohn and their selection was based on similar criteria. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1228 (10th Cir. 2006).

Of course, trial courts may disallow even relevant evidence if its probative value is substantially outweighed by its prejudicial effect, or if the evidence is unnecessarily cumulative or would confuse the jury. *See* Fed. R. Evid. 403. In light of these safeguards, a *per se* rule of exclusion is unnecessary, and would undercut the discretion of trial court judges who know the particular facts of each case and who are in the best position to determine evidentiary questions. *See Estes v. Dick Smith Ford*, 85 F.2d 1097, 1103 (8th Cir. 1988) (recognizing the evidentiary limitations a *per se* rule of

exclusion in employment discrimination cases would place on plaintiffs).

B. Sprint's and Its *Amici's* Fears of Groundless Employment Discrimination Claims are Unfounded.

Sprint and its *amici* express doomsday fears about the potential implications of the introduction of "other supervisor" evidence into employment discrimination cases. They contend that preserving judicial discretion on the admissibility of "other supervisor" evidence will result in uncontrollable, never-ending trials and will lead plaintiffs to file frivolous lawsuits. Neither Sprint nor its *amici*, present any evidence in support of this argument, and they omit reference to the many Circuit Courts of Appeal that have long held that this category of evidence should be subject to the standard discretionary rules of evidence.[23] If allowing "other supervisor" evidence would force such drastic consequences, then the effects would presumably already be apparent in those circuits that allow plaintiffs to present such evidence. Surely, if Sprint had any evidence to support its position, it would be cited in its brief. Given that neither Sprint nor any of its *amici* have come forth with any such evidence, it seems likely that these fears are highly exaggerated or entirely unwarranted.

There is similarly no basis to believe Sprint's *amici*'s suggestion that, unless this Court adopts the *per se* exclusionary rule urged by Sprint, employers will be

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[23] *See Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006); *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001); *Philip v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986).

forced to settle all lawsuits filed by employees accusing the company of discrimination. (Employer's Grp. Br. at 7.) Admitting "other supervisor" evidence will not change the legal test for determining liability—a plaintiff must still prove that he or she suffered an adverse employment action because of a protected characteristic. Moreover, as in any civil case, the threat of frivolous lawsuits is curbed by the availability of Rule 11 sanctions to deter and punish attorneys who file meritless claims.

C. Admitting Other Supervisor Evidence Should Reduce Discrimination Claims by Encouraging Employers to Adopt Reasonable Measures to Ensure Compliance with Anti-Discrimination Laws.

Sprint and its *amici* allege that, if this Court allows plaintiffs to present "other supervisor" evidence, large employers will be forced to ensure that all decisions are made in accordance with a common policy by adopting a more centralized management structure. (EEAC *et al.*'s Br. at 11; Chamber of Commerce's Br. at 17.) They further claim that a centralized structure is inefficient and would put corporations at a competitive disadvantage in the marketplace. (EEAC *et al.*'s Br. at 11.) Again, Sprint and the business community fail to support their claim with even a single instance in which a corporation conducting business in the circuits allowing "other supervisor" evidence has had to change to its corporate structure.

In another case that was recently before this Court,[24] the business community stated that the Human Resources or General Counsel's office of many large employers already conduct formal reviews of all termination decisions. For instance, the Equal Employment Advisory Council discussed the prevalence of this type of review in the *amicus* brief it filed in *BCI Coca-Cola v. EEOC*. That brief described the management structure as follows:

> Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation.[25]

Similarly, the Chamber of Commerce asserted that the actual decision-maker in a large corporation may often be a senior manager rather than an employee's direct supervisor, allowing the senior manager to ensure consistency with company policies.[26] Surely, the business community cannot tout this review process

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[24] *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007) (Petition withdrawn prior to oral argument.

[25] Brief *Amici Curiae* of the Equal Employment Advisory Counsel in Support of Petitioner at 14, *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007).

[26] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 16, *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007).

when they seek to avoid liability in one case, and then claim it is overly burdensome in another.[27]

Contrary to the fears expressed by Sprint and its *amici*, the likely result of allowing plaintiffs to present relevant "other supervisor" evidence will be to encourage employers to reasonably oversee employment decisions, thereby preventing upper-management from overlooking discriminatory employment practices. Such a review may illuminate latent discriminatory practices, thereby preventing future discrimination and reducing the employer's exposure to lawsuits.

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[27] If an employer performs the type of review herein described, even under Sprint's rationale which requires a "demonstrated link" between "other supervisor" evidence and the challenged employment decision (Pet. Br. at 38), plaintiffs should be able to present "other supervisor" evidence to the trier of fact. If a senior manager or human resources employer reviews the personnel decisions of several different supervisors, this provides a sufficient link between the decisions of all supervisors subject to such review.

CONCLUSION

For the foregoing reasons, this Court should decline to adopt the *per se* rule of exclusion urged by Sprint and its *amici*. This Court should instead continue to permit trial courts to determine the admissibility, and juries to weigh, the "other supervisor" evidence on the case-by-case basis provided for in the Federal Rules of Evidence.

Respectfully submitted this 19th day of October, 2007.

Respectfully Submitted,

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APPENDIX

APPENDIX

List of *Amici:*

Organizations

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation, to eradicate discrimination, is fully realized. The resolution of this case will have a significant effect on the extent to which the Lawyers' Committee can protect the rights of its clients. The Lawyers' Committee has prepared or participated in numerous *amicus* briefs in Title VII cases before this Court, including *BCI Coca-Cola v. EEOC, Burlington Northern v. White,* and *Desert Palace v. Costa.*

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of

experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC and its Affiliates have a long-standing interest in workplace discrimination cases that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF's mission includes a commitment to employment equity and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The principle objectives of the NAACP are to ensure the political, educational, social and economic equality of rights and eliminate race prejudice among citizens of the United States; to remove barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take other lawful action in furtherance of these objectives. The NAACP believes that every individual has a right to secure a job

APPENDIX - continued

for which she is qualified without discrimination because of race, color, religion, sex or national origin. Consequently, the proper construction of the law, including the law of evidence, in employment discrimination cases is critical with respect to the Court's role of interpreting the law to ensure that Congress' intent in passing anti-discrimination statutes is duly effectuated and that justice be done.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") was incorporated in 1939 under the laws of New York State to provide legal assistance to black persons in securing their constitutional rights. For over six decades, LDF has appeared as counsel of record or *amicus curiae* in numerous cases involving race discrimination before the Supreme Court, the Courts of Appeals, and the federal District Courts. Since its passage 40 years ago, LDF has worked ceaselessly to enforce Title VII, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices. Among the hundreds of Title VII cases LDF has litigated are *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), both considering the issue of circumstantial proof of discrimination. Given its expertise, LDF believes its perspective would be helpful to this Court in resolving the issues presented in this case.

The National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an

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International Chapter in Europe. The National Association of Social Workers, Kansas Chapter has 1,410 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. The *NASW Code of Ethics* directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, sexual orientation, age, marital status, political belief, religion, or mental or physical disability." NASW policies state, "Given the persistence and pervasiveness of workplace discrimination, pay and employment equity must remain a major policy issue for the social work profession and for the nation." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Gender, Ethnic, and Race-Based Workplace Discrimination*, SOCIAL WORK SPEAKS, 172, 175 (7th ed., 2006). Accordingly, given NASW's policies and the work of its members, NASW has expertise that

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will assist the Court in reaching a proper resolution of the questions presented in this case.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since

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1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964. NWLC has prepared or participated in numerous *amicus* briefs in Title VII cases before this Court.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 1,000,000 members and activists nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that Americans have meaningful access to the courts to enforce their right to a workplace free of unlawful discrimination. PFAWF joins this brief to help vindicate that important right.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national nonprofit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

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Women Employed's mission is to improve the ecoromic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly believes that "other supervisor" evidence can be relevant to proving the existence of discrimination.